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In The
Supreme Court of the United States

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; LOUISIANA DEPARTMENT OF EDUCATION; STATE OF LOUISIANA,

Petitioners,

v.

TRAVIS PACE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can Congress condition federal financial assistance to states upon a waiver of sovereign immunity under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, and, if so, are 42 U.S.C. § 2000d-7(a) of the Civil Rights Remedies Equalization Act and 20 U.S.C. § 1403(a) of the Individuals with Disabilities Education Act unconstitutionally coercive as applied in this case?

2. Under 42 U.S.C. § 2000d-7(a) of the Civil Rights Remedies Equalization Act and 20 U.S.C. § 1403(a) of the Individuals with Disabilities Education Act, can a waiver of sovereign immunity ever be knowing and voluntary when, under the jurisprudence at the time of complainant's cause of action and at the time the state accepted financial aid, immunity was already abrogated?

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The *en banc* opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005) (*en banc*) and is reprinted at App. 1. The panel opinion is reported at *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir. 2003), *opinion vacated*, 325 F.3d 609 (5th Cir. 2003) and is reprinted at App. 63. The District Court issued two opinions that were appealed to the Fifth Circuit, one dated August 23, 2001 which is reprinted at App. 88 and one dated March 15, 2001 which is reprinted at App. 98.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1251 and § 1254. The claims asserted by Travis Pace were dismissed by the Fifth Circuit. All that remains is a controversy between the State of Louisiana and the United States who intervened into this matter pursuant to 28 U.S.C. § 2403(a) concerning state sovereignty. The Fifth Circuit's *en banc* decision was issued March 8, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. art. I, § 8, cl. 1:

> The Congress shall have the power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts, and to provide for a common Defense and general welfare of the United States.

42 U.S.C. § 2000d-7(a). Civil Rights Remedies Equalization Act.

> A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], title IX of the Education Amendments of 1972 [20 U.S.C. § 1681, *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. § 6101, *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d, *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs.

> (a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing

committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

20 U.S.C. § 1403. Individuals With Disabilities Education Act.

(a) In general

A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.

STATEMENT OF THE CASE

A. Statement of Facts.

Respondent Travis Pace, at age 15, enrolled at Bogalusa High School in 1994. He is developmentally disabled, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In 1997 Pace's mother requested a due process hearing alleging denial of a free, appropriate public education, lack of handicap access, and alleged deficiencies in Pace's individualized education programs.[1]

Dissatisfied with the hearing officer's opinion that the Bogalusa City School System was in compliance with the law, Pace filed suit in federal district court in March, 1999, against the State of Louisiana, the Louisiana State Board of Elementary and Secondary Education, and the Louisiana Department of Education (jointly, the "State of Louisiana") and the local School District.[2] Pace claimed the

[1] *Pace v. Bogalusa City School Bd.*, 325 F.3d 609, 612 (5th Cir. 2003), *opinion vacated*, 325 F.3d 348 (5th Cir. 2003), App. 65.

[2] The Bogalusa City School Board was a party throughout the proceedings below, but the School District has no interest in the

(Continued on following page)

defendants violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, *et seq.*[3]

At the time Pace enrolled in the school system in 1994, and at the time of Pace's suit in 1999, the jurisprudence in the United States Court of Appeals for the Fifth Circuit, where Pace was located, was clear: a state had to comply with the substantive obligations of the ADA and Rehabilitation Act regardless of whether it accepted federal aid. Under the law in the Fifth Circuit, states had no immunity to ADA claims, for *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998), *cert. denied,* 525 U.S. 819 (1998), had held that Congress had "the authority to abrogate states' immunity" under the ADA. Both the Fifth and Tenth Circuits had characterized *Coolbaugh* as "holding that the entire ADA abrogates state sovereign immunity, not just Title II."[4]

During the late 1990s, the Louisiana Department of Education had to comply with the ADA and Rehabilitation Act regardless of whether it accepted federal aid. Neither acceptance nor rejection of federal aid exposed Louisiana to any new causes of action because *Coolbaugh* had held that states were liable for ADA violations, and the substantive requirements of the ADA and Rehabilitation Act

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Eleventh Amendment issue involved in this Petition for Writ of Certiorari.

[3] *Pace*, 325 F.3d at 612, App. 65.

[4] *Reickenbacker v. Foster*, 274 F.3d 974, 978 (5th Cir. 2001) (*citing, Neinast v. Texas*, 217 F.3d 275, 280, n. 29 (5th Cir. 2000), *cert. denied,* 531 U.S. 1190 (2001); and *Thompson v. Colorado*, 258 F.3d 1241, 1249 n. 4 (10th Cir. 2001), *cert. denied,* 535 U.S. 1077 (2002)).

are identical.[5] Because there was no possibility of preserving sovereign immunity by not accepting the funding, sovereign immunity considerations played no role in whether the Louisiana Department of Education accepted federal aid.

Seven years after Pace enrolled in school, and two years after Pace filed this lawsuit, the Fifth Circuit reversed *Coolbaugh* in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001),[6] holding that Title II of the ADA and the Rehabilitation Act did not validly abrogate Eleventh Amendment sovereign immunity. A few months earlier, a portion of *Coolbaugh* had been overturned by this Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) which held that Title I of the ADA did not validly abrogate state sovereign immunity.

It was only after *Garrett* and *Reickenbacker* were decided that Louisiana could have known that it could retain its immunity to claims arising under the Rehabilitation Act by not accepting federal aid. However, at this point, in 2001, Pace's case had already been filed and the

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[5] The ADA itself states that "[t]he remedies, procedures, and rights" under § 504 are also available under the ADA. 42 U.S.C. § 12133. Furthermore, Congress amended § 504 to expressly incorporate the liability standards of the ADA. *See*, Rehabilitation Act Amendments of 1992, Pub.L. No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. § 794(d)) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act."). *See also*, *Reickenbacker*, 274 F.3d at 978.

[6] *Reickenbacker* was partially overruled by *Tennessee v. Lane*, 541 U.S. 509 (2004) as it applies to the right of access to courts. However, this fact does not affect the analysis here.

state had long since accepted federal aid at the time when *Coolbaugh* was the law.

B. The District Court Opinion and the Panel Opinion.

The district court bifurcated Pace's IDEA and non-IDEA claims. In separate orders, it dismissed Pace's IDEA claims, then granted the defendants' motions for summary judgment on Pace's non-IDEA claims. Pace appealed both decisions.

The Fifth Circuit's panel opinion[7] affirmed the District Court but on separate grounds. While this matter was pending, the panel asked the parties to address whether the State of Louisiana had immunity to the claims asserted and asked for briefs "[o]n whether Eleventh Amendment sovereign immunity bars the claims in this case. . . ."

In response, the State of Louisiana argued that it did not knowingly waive its immunity by accepting federal aid at a time when *Coolbaugh* was the controlling jurisprudence. Louisiana also argued that Congress exceeded its authority under 42 U.S.C. § 2000d-7 by requiring States to waive their immunity to claims arising under the Rehabilitation Act as a condition to receiving federal aid and that 42 U.S.C. § 2000d-7 and the IDEA were unconstitutionally coercive as applied in this case. Thereafter, the United States intervened pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the waiver provisions of § 2000d-7 and the IDEA.

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[7] 325 F.3d 609 (5th Cir. 2003), App. 63.

The panel held that Congress may require states to waive their sovereign immunity as a condition for receiving federal aid. *Pace,* 325 F.3d at 615, App. 70. The panel did not address Louisiana's argument that it was coerced. The panel did find, however, that the State of Louisiana could not have knowingly waived its immunity by accepting federal financial assistance in this case because its immunity had already been abrogated. *Id.* at 617, App. 74.[8] Thereafter, Pace and the United States sought *en banc* consideration by the Fifth Circuit.

C. The *En Banc* Opinion.

On rehearing *en banc*, the eight-member majority reversed the panel's opinion, holding that Louisiana waived its sovereign immunity because it knowingly and voluntarily accepted federal financial assistance.[9] The *en banc* majority found that Congress has authority under the Spending Clause to condition receipt of federal aid upon a wavier of sovereign immunity[10] and concluded that, although $800 million of federal aid was at stake, Louisiana's dependency upon this aid did not amount to coercion.[11] Finally, the majority reversed the panel's holding that the State of Louisiana knowingly waived its immunity when it accepted federal financial assistance even

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[8] On a separate issue, the Panel also affirmed the district court's dismissal of Pace's IDEA claims, and held that the non-IDEA claims (ADA and § 504) were barred because they had already been litigated under Pace's IDEA claim. The separate rulings relating to *Pace*'s IDEA and non-IDEA claims are not involved in this Petition for Certiorari.

[9] *Pace v. Bogalusa City School Board,* 403 F.3d 272, 285 (5th Cir. 2005) (*en banc*), App. 23-24.

[10] *Id.* at 278-85, App. 9-23.

[11] *Id.* at 287, App. 28.

though, at the time Louisiana accepted the aid, the existing jurisprudence held unequivocally that its immunity was abrogated.[12]

The six-member dissent argued that the Court "crafted a novel waiver test for Spending Clause cases" and asserted that the State of Louisiana did not knowingly waive its immunity when it accepted federal aid.[13] The dissent also expressed concern that the conditional waiver requirements may be unconstitutionally coercive.[14]

REASONS FOR GRANTING THE WRIT

There are three separate and independent reasons why this writ of certiorari is worthy of being granted. First, the federal government has conditioned receipt of hundreds of millions of dollars in federal aid upon a state's waiver of sovereign immunity, but this Court has never ruled on whether and under what circumstances such conditional waivers can be applied to the states under the Spending Clause. Second, there is a split in the circuits on whether conditions placed upon federal financial assistance are coercive, and, if so, what test should be applied. Third, there is a split in the circuits on whether jurisprudence as well as statutes should be considered in determining a

[12] The Fifth Circuit *en banc* agreed with the Panel, and affirmed the district court's judgment that Pace's IDEA claims should be dismissed, and that Pace's non-IDEA claims (ADA and § 504) should also be barred under the principles of issue preclusion. As noted in footnote 8 above, the Fifth Circuit's rulings related to the IDEA and issue preclusion claims are not before this Court.

[13] *Pace*, 403 F.3d 272, 303 (5th Cir. 2005) (*en banc*) (Jones, Jolly, Smith, Barksdale, Garza and DeMoss, dissenting), App. 60-61.

[14] *Id.* at 299-300, n. 2., App. 53.

state's notice of conditions placed on federal financial assistance. This case squarely presents all three questions.

I. Whether Congress may use its spending power to condition receipt of federal financial assistance upon a waiver of sovereign immunity is a question of exceptional national importance which has never been addressed by this Court.

This Court has never directly ruled whether Congress, under the Spending Clause,[15] can condition the receipt of federal financial assistance upon a waiver of sovereign immunity and, if so, in what instances. This is a critical issue of national importance, for literally hundreds of millions of dollars in federal funding, grants, and financial aid in a variety of areas are contingent upon a state waiving its sovereign immunity.[16] The question, therefore, is whether the Spending Clause can trump the Eleventh Amendment and, if so, under what conditions.

A. Congress' recent use of its spending power has eroded State autonomy.

Federal grants to states and localities have increased nearly 40,000% over the past sixty years, growing from $991 million in 1943 to $18.173 billion in 1968 and

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[15] U.S. Const. art. 1, § 8, cl.1.

[16] For instance, acceptance of federal funds under the following spending programs requires waiver of state sovereign immunity: Title IX (20 U.S.C.A. 1681); Civil Rights Act (42 U.S.C. § 2000d) which subjects states to suit for accepting funds from the Dept. of Transportation (49 C.F.R. 21.5(b)(12)) and the Dept. of Justice (28 C.F.R. 42.104); Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc-2(a)); IDEA (20 U.S.C. § 1403).

$387.281 billion in 2003.[17] While federal financial assistance constitutes an increasingly large portion of each state's revenue, none of this money is offered to states unconditionally.[18] Instead, Congress uses federal financial assistance to achieve numerous policy ends indirectly through the Spending Clause that it could not accomplish directly. For example, Congress has used its Spending Power to prohibit federal contractors from discussing abortion while working at federally-funded health clinics,[19] to ensure that federal funds are not used to support art that is deemed indecent,[20] and to achieve a national speed limit,[21] a national drinking age,[22] and numerous other objectives.[23]

Until relatively recently, it had been widely believed that Congress had authority under its Article I powers to abrogate state sovereign immunity. This Court's earlier Commerce Clause decisions had also suggested that

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[17] *See*, Bureau of the Census, U.S. Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970, pt. 2, at 1125 (1943 and 1968 statistics); Statistical Abstract of the United States, 2004-2005, at 266 (2003 statistics) (tbl. 424) (124th ed. 2004-2005) (http://www2.census.gov/prod2/statcomp/documents/CT1970p2-12.pdf).

[18] Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum. L. Rev. 1911, 1918 (1995).

[19] *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

[20] *NEA v. Finley*, 524 U.S. 569, 587-88 (1998).

[21] *Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989).

[22] *South Dakota v. Dole*, 483 U.S. 203 (1987).

[23] *See, e.g., Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 846 (1984) (denying federal assistance to students who had not registered for the draft); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding federal legislation prohibiting the use of medicaid funds for abortions); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (*per curiam*) (upholding spending restrictions on candidates who receive federal funds).

Congress could regulate the states as it chose. It was not until the mid-1990s that this Court began to limit Congress' powers under Article I.

In *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), this Court held that the Gun-Free School Zones Act of 1990 was not a proper exercise of Congress' powers under the Commerce Clause since the Act did not "substantially affect" interstate commerce. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court held that Congress may not use its Article I powers, including the Commerce Clause, to abrogate state sovereign immunity; instead, abrogation can only occur under § 5 of the Fourteenth Amendment. Since *Seminole Tribe*, this Court has further limited Congress' ability to abrogate under § 5 of the Fourteenth Amendment on many occasions.[24]

As a result of these decisions, Congress has become more reliant upon its spending power in order to entice States to comply with federal policies. The Spending Clause power, if left unchecked, however, could destroy state autonomy, a goal that this Court has vigorously pursued as evidenced by its recent jurisprudence. In fact, several members of this Court, several Circuit Court of Appeal Judges[25] and

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[24] *See, e.g., Bd. of Trustees of Univ. of Al. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[25] *See, Jim C. v. U.S.*, 235 F.3d 1079, 1085 (8th Cir. 2000) (*en banc*) (Bowman, Beam, Loken, Bye, dissenting), *cert. denied, Ark. Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001). ("By resort to the spending power . . . Congress could achieve indirectly the same abrogation of Eleventh Amendment Immunity that it could not achieve directly."); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1171 (D.C. Cir. 2004) (Sentelle, dissenting), *cert. denied, Washington Metropolitan Area Transit Authority v. Barbour*, ___ U.S. ___, 125 S.Ct. 1591, (2005). ("[i]t is implausible to

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legal commentators[26] have expressed concern about Congress' recent expanded use of the spending power and its effect upon state autonomy.

This Court stated in *New York v. U.S.*, 505 U.S. 144 (1992) that conditions must bear a relationship to the spending programs; otherwise, "the spending power could render academic the Constitutions other grants and limits on federal authority."

Justice O'Conner voiced her concerns in *South Dakota v. Dole,* 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) (*quoting, United States v. Butler,* 297 U.S. 1, 78 (1936)): "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the

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presume that 'the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers . . . they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" (*citing, United States v. Butler*, 297 U.S. 1 (1936)); and *Commonwealth of Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570-571 (4th Cir. 1997) (Luttig dissenting), (superseded by statute) ("In the end, this case is about the permissible reach of federal power under the Spending Clause in a time when the several States have become increasingly dependent upon the Federal Government for funds . . . ").

[26] *See*, Lynn A. Baker, *The Spending Power and the Federalist Revival,* 4 Chap. L. Rev. 195, 196 (2001). "[T]he greatest threat to state autonomy is, and has long been, Congress' spending power." Baker argues that without revisiting the Court's holding in *Dole*, the Court's sovereign immunity and Commerce Clause jurisprudence will be effectively mooted. Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 Colum. L. Rev. 1911, 1913-14 (1995). *See also*, Coulter M. Bump, *Reviving the Coercion Test: A proposal to prevent federal conditional spending that leaves children behind*, 76 U. Colo. L. Rev. 521 (2005) (arguing that the Court should create effective limits on congressional spending authority.)

Spending Clause gives power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Justice Kennedy, writing on behalf of Chief Justice Rehnquist, Justice Scalia and Justice Thomas, expressed similar concerns in the dissent in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 654-55 (1999) "the Spending Clause Power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between nation and local spheres of interest and power. . . ."

This case squarely presents the opportunity to examine the limitations of Congress' ability to enforce policy objectives indirectly through the Spending Clause. Louisiana urges this Court to find that Congress cannot condition substantial funding for education upon states' waiving their immunity to claims under the Rehabilitation Act or the IDEA.

B. The panel and *en banc* majority relied upon *dicta* to reach their holding.

The panel opinion held that Congress could condition the receipt of federal financial assistance upon a waiver of sovereign immunity, yet, it recognized that no Supreme Court authority existed supporting this holding, noting that "[i]n dicta, the Supreme Court has stated that Congress may require states to waive their sovereign immunity as a condition for receiving federal funds."[27] The *en banc* opinion reached the same conclusion, but for

[27] *Pace*, 325 F.3d at 615, App. 70.

different reasons: it held that as long as the condition imposed meets the test announced in *South Dakota v. Dole*, 483 U.S. 203 (1987), "no independent constitutional bar invalidates," the condition.[28]

The panel and the *en banc* majority relied upon *obiter dicta* in *Alden v. Maine*, 527 U.S. 706 (1999) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) in concluding that Congress can condition federal financial assistance upon a waiver of sovereign immunity.[29] However, neither *Alden* nor *College Savings* confronted the question directly.[30]

The *en banc* majority also relied upon *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) which reaffirmed the general proposition that Congress may attach conditions to its financial grants. However, *Dole* did not involve any attempt to compel the surrender of a constitutional protection, such as sovereign immunity. To the contrary, the Court in *Dole* rejected the idea that the funding condition at issue – raising the minimum drinking age to 21 – infringed on any constitutional prerogative of the States. *Id.* at 209-10. The Court in *Dole* thus had no occasion to

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[28] *Pace*, 403 F.3d at 287 (*en banc*), App. 27.

[29] Other circuit courts have relied upon the dicta in *Alden* and *College Savings* to support their holding that Congress has power under the Spending Clause to condition federal aid upon a waiver of state sovereign immunity. *See, Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004); and *A.W. v. The Jersey City Public Schools*, 341 F.3d 234 (3rd Cir. 2003).

[30] Neither *Alden* nor *College Savings* addressed whether the spending power authorized Congress to condition federal aid upon a waiver of immunity.

consider whether, or under what circumstances, Congress could compel the waiver of such a constitutional right.

In *Dole*, the Court stated that objectives not thought to be within Congress' power to regulate directly "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id.* at 207. However, *Dole* did *not* suggest that Congress may condition receipt of federal financial assistance upon a waiver of sovereign immunity. Sovereign immunity was not even at issue in *Dole*.

C. This Court's unconstitutional conditions doctrine prohibits Congress from conditioning federal aid upon a waiver of immunity.

This Court has held that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996). Just as "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program" *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981), a state should have a similar right of Eleventh Amendment immunity. *See, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999).

This Court has applied the unconstitutional conditions doctrine to the right of free speech and the right of lawyers to practice. *See, Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984) (holding that Congress did not have authority

to condition the receipt of federal funds on the waiver of the First Amendment right to speech) and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that Congress could not condition funding for legal services to the indigent on lawyers refraining from challenging the constitutionality of federal statutes).

In a series of cases in the mid-nineteenth century, this Court struck down a number of state laws which required foreign corporations, as a condition of doing business, to submit to the jurisdiction of the state courts. This Court ruled that these state laws were invalid attempts to impose unconstitutional conditions.[31]

Here, the right of sovereign immunity is no less a constitutional right than the right of corporations to conduct business, the right of attorneys to practice law, or the right of free speech. Indeed, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999), the Court found that "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *See also, Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). Accordingly, there is no basis to treat sovereign immunity any differently than other fundamental constitutional rights.

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[31] *See, Home Insurance Co. of New York v. Morse*, 20 Wall. 445, 87 U.S. 445 (1874); *Barron v. Burnside*, 121 U.S. 186 (1887); *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922). In two other cases, the Court upheld such laws over vigorous dissents. *See, Doyle v. Continental Insurance Co.*, 4 Otto 535, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting); *Security Mut. Life Insurance Co. v. Prewitt*, 202 U.S. 246, 258 (Day, J., dissenting) (1906), but in *Terral*, the Court overruled both *Doyle* and *Prewitt*, and adopted the dissenters' views as its own. *Terral*, 257 U.S. at 533.

The Court recently described sovereignty as "the dignity that is consistent with [States] status as sovereign entities." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002). The Court explained that "[t]he founding generation thought it neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty . . . should be summoned as defendants to answer complaints of private persons." *Id.* (citations omitted).

When applying the unconstitutional conditions doctrine, this Court has focused upon the right at issue and not the party challenging the statute. Both the *Pace* majority and the United States Court of Appeals for the Third Circuit erred by focusing upon the fact that a state as opposed to a private individual was the aggrieved party.[32] This Court has not made such a distinction and has instead focused upon the right at issue. *See, Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (where this Court's inquiries focused on the benefit being conferred and the constitutional right at issue). This Court has never limited its inquiry to certain classes of natural or judicial persons. There is no basis to limit this doctrine to exclude states.

Congress cannot condition the receipt of a benefit upon an infringement of a constitutional right. As this Court explained, "a person may not be compelled to choose

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[32] *See, Pace*, 403 F.3d at 286, App. 25-27; *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161 (3rd Cir. 2002), *cert. denied, Penn. Dept. of Corrections v. Koslow*, 537 U.S. 1232 (2003). The petition for writ of certiorari filed with this Court in *Koslow* also asserted that the unconstitutional doctrine prohibits Congress from conditioning federal aid on a waiver of immunity. This issue is now ripe for consideration.

between the exercise of a [constitutional] right and participation in an otherwise available public program." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981). Yet, this is exactly what Congress does in the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7 and the Individuals with Disabilities Education Act, 20 U.S.C. § 1403(a). These statutes condition the receipt of federal financial assistance upon the requirement that States waive sovereign immunity, a constitutional right. The "unconstitutional conditions" doctrine prohibits this type of condition on federal financial assistance.

The State of Louisiana urges this Court to consider this matter and provide guidance to restore state autonomy, as the Framers of the Constitution envisioned, by holding that Congress cannot condition a substantial benefit (here $800 million dollars in educational funds) upon the waiver of state sovereign immunity.

II. On several occasions, this Court has ruled that certain conditions placed upon federal aid may be unconstitutionally coercive; yet, it has not articulated a test resulting in a circuit split. Here, this Court is given the opportunity to announce a test and resolve the circuit split.

In *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), this Court recognized that Congress may place conditions upon federal financial assistance so long as the condition is not coercive. This Court cautioned that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'." *Id.* (*quoting, Steward Machine Co. v. Davis,* 301 U.S. 548, 590 (1937)).

Most recently, in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999), the Court recognized that coercion continues to be a limitation upon the spending power. However, neither *Dole* nor *College Savings* contained a test for courts to apply in determining if a statute is coercive.[33] As a result, the Circuit Courts of Appeals have employed a variety of tests.

A. A circuit split exists concerning how to apply this Court's coercion test.

No uniform approach exists for determining whether a condition placed upon federal financial assistance is unconstitutionally coercive. While some circuit courts of appeal consider the level of funding and the condition placed on those funds, other circuit courts question whether a coercive limitation actually exists, calling such a theory unclear, suspect, and with little precedent.[34] Still, other circuit courts have simply declined "to enter this thicket" as a result of uncertainty.[35] Given the diverse views of the coercion theory by the Circuit Courts of Appeals, this Court should hear this matter and provide much needed guidance.

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[33] The last time this Court held a statute was unconstitutionally coercive was in *United States v. Butler*, 297 U.S. 1, 68 (1936), in which this Court held that the Agricultural Adjustment Act was coercive and violated the Tenth Amendment, because it regulated "agricultural production, a matter beyond the powers delegated to the federal government."

[34] *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000).

[35] *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981).

Perhaps the Fourth Circuit Court of Appeals is the most favorable for States.[36] In *West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 289 (4th Cir. 2002), the Fourth Circuit found that this Court's "cases have provided little guidance for determining when the line between encouragement and coercion is crossed." As a result, the Fourth Circuit reasoned that "most courts faced with the question have effectively abandoned any real effort to apply the coercion theory." *Id.* at 290. But, the court noted that in its circuit, "the coercion theory is not viewed with such suspicion, but instead has been endorsed by a substantial number of judges on the court, as evidenced by our *en banc* decision in *Riley*." *Id.* The Fourth Circuit held in *West Virginia* "that the coercion theory remains viable in this circuit, and that federal statutes that threatened the loss of an entire block of federal funds upon a relatively minor failing by a State are constitutionally suspect." *Id.* at 291.

Unlike the Fourth Circuit, the Eighth Circuit has refused to find that the level or amount of funding could constitute impermissible coercion. *See, Jim C. v. United States*[37] (holding that $250 million in educational funds or 12% of Arkansas' education budget is not unconstitutionally coercive); *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003) (holding that $557 million or 60% of Nebraska's

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[36] *See, Commonwealth of Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*), superseded by statute as stated in *Amos v. Maryland Dept. of Public Safety and Correctional Services*, 126 F.3d 589 (4th Cir. 1997); and *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002).

[37] 235 F.3d 1079, 1082 (8th Cir. 2000) (*en banc*), *cert. denied, Arkansas Dept. of Education v. Jim C.*, 533 U.S. 949 (2001).

Department of Social Services budget was not unconstitutionally coercive.)

In *Pace*, the eight-member majority of the Fifth Circuit took an entirely different approach. The Fifth Circuit explained that "if the clear statement rule is satisfied a State's actual acceptance of clearly conditioned funds is generally voluntary."[38] The Fifth Circuit recognized an exception to this rule "if the spending program itself is deemed 'coercive.'"[39] As the dissent in *Pace* explained, the test established in the Fifth Circuit is "novel" and has not been adopted by any other circuit.[40] Under the *Pace* majority's reasoning, the level of funding is irrelevant.

The Ninth and Tenth Circuits found that the coercion theory is suspect. *See, Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect and has little precedent to support its application."); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997) ("[T]o the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record.").

The District of Columbia Circuit has taken yet another approach. *See, Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether states are faced here with an offer they cannot refuse or merely a hard choice . . . We therefore follow the lead of other courts that have explicitly declined

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[38] *Pace*, 403 F.3d at 279 (*en banc*), App. 13.

[39] *Id.*

[40] *Pace*, 403 F.3d at 298 (*en banc*), App. 53. (Jones, Jolly, Smith, Barksdale, Garza and DeMoss, dissenting).

to enter this thicket when similar funding conditions have been at issue.").

Given the wide disparity in the way the Circuit Courts of Appeal analyze whether spending conditions are unconstitutionally coercive, this Court should consider this issue and hold that it is unconstitutionally coercive to condition the receipt of substantial federal aid for education upon a waiver of sovereign immunity.

B. The Louisiana Department of Education was coerced into waiving its sovereign immunity in order to receive $800 million in education funds.

The Louisiana Department of Education receives three quarters of its annual budget from the federal government – $800 million in 2002 alone. As a condition for accepting this federal aid, the Louisiana Department of Education must "waive" its immunity to claims arising under the Rehabilitation Act pursuant to 42 U.S.C. § 2000d-7. The loss of $800 million would be devastating upon Louisiana's primary and secondary education system. Louisiana's school children would suffer severe consequences if Louisiana chose not to accept these funds in order to retain sovereignty.

The dissent in *Pace* succinctly framed the issue which the State of Louisiana asks this Court to consider by stating, "'If not now, and on this showing, when, and on what showing' will federal grants be deemed unconstitutionally coercive? . . . To date, the Supreme Court has not found a case that warranted vindication of this principle. Nevertheless, Louisiana and its children would suffer extreme consequences here if the State were to lose

massive federal assistance by asserting its constitutional right to sovereign immunity."[41]

The dissent in *College Savings*, 527 U.S. at 697 (Breyer, J., Stevens, J., Souter, J., and Ginsburg, J., dissenting) agreed that "[i]t is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children" than was the condition at issue in *College Savings*. Here, over $800 million that would be used by the Louisiana Department of Education for education purposes is at issue. If, as the *College Savings* dissent contends, the condition here is more coercive than the condition at issue in *College Savings*, then the condition must be unconstitutionally coercive. Here, the consequences upon Louisiana's school children would have been so severe that Louisiana had no choice but to waive its immunity.

In *Dole*, this Court found that conditioning 5% of highway grant funds upon a condition that South Dakota raise its drinking age to 21 was not coercive. The choice that South Dakota was faced with was relatively minor compared to Louisiana's choice. Here, 42 U.S.C. § 2000d-7 has conditioned 75% of the Louisiana Department of Education's budget (a total amount of federal aid being $800 million) upon waiver of sovereign immunity. Unlike *Dole*, where a mere 5% of the highway budget was at issue, Louisiana had no choice – waive immunity or suffer dire consequences for Louisiana's school children.

Here, a finding of coercion is proper, based on "robust common sense"[42] and a review of the total impact of all of the coercive factors involved, including:

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[41] *Pace*, 403 F.3d at 301, n. 2, (*en banc*), App. 53-54 (Jones, Jolly, Smith, Barksdale, Garza and DeMoss, dissenting).

- the total federal dollar amount involved ($800 million) and its percent (75%) in relation to the budget of the Louisiana Department of Education;
- the IDEA imposes a substantial unfunded obligation on States – in 2003, only 16.5% of the IDEA was federally funded;[43]
- 42 U.S.C. § 2000d-7 conditions all federal funds a state department receives upon waiver of immunity;[44]
- 42 U.S.C. § 2000d-7 and 20 U.S.C. § 1403(a) encompasses federal regulation of education, which is a Tenth Amendment core function of the State;[45] and

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[42] *Steward Machine Co.*, 301 U.S. at 590.

[43] Report On The Activities Of The Committee On Education And The Workforce, House Report No. 107-797, p. 17 (January 2, 2003). Congress has acknowledged that the failure of the federal government to fund its mandates for special education has imposed a substantial burden on the States. The House Conference Report on the 2000 budget states:

> 4. The budget submitted to the President for fiscal year 2000 ignores the commitment of the Federal government under the Act to fund special education and instead proposes to create new programs that limit the manner in which States may spend the limited federal education dollars received.
>
> 5. The budget . . . fails to increase funding for special education, and leaves States . . . with an enormous unfunded mandate to pay for growing special education costs.

Concurrent Resolution on the Budget for Fiscal Year 2000, House Conference Report No. 106-91, pp. 26-27 (April 14, 1999).

[44] *See, Jim C.*, 235 F.3d at 1081; *Koslow*, 302 F.3d at 171 (holding that the waiver of immunity in 42 U.S.C. § 2000d-7 applies to an entire state department if it accepts federal financial assistance).

[45] *See, e.g., Honig v. Doe*, 484 U.S. 305, 309 (1988) ("[E]ducation [is] 'perhaps the most important function of state and local governments.'"

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- 42 U.S.C. § 2000d-7 and 20 U.S.C. § 1403(a) condition federal financial assistance upon the waiver of a fundamental constitutional right – sovereign immunity.[46]

After all relevant factors are considered, the conclusion is inescapable. Louisiana could not, as a practical matter, afford to forfeit all federal education funds in order to retain its sovereign immunity. Where substantial education funds are concerned, the choice becomes impossible and the waiver conditions imposed by Congress are unconstitutionally coercive.

The State of Louisiana asks this Court to grant the writ and, following the mandate of *Dole*, rule that it is unconstitutionally coercive to condition federal aid that constitutes a substantial sum of federal educational funds, forming more than 2/3 of the budget, upon a state's waiver of immunity.

III. A circuit split exists concerning how courts should determine whether a state has notice of the conditions placed upon federal financial assistance.

Given the frequency with which Congress uses the Spending Power to impose policy objectives upon states, and states' dependency upon federal aid, conditions placed upon federal aid is an issue of national significance.[47] Yet,

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(*quoting, Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954))); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . "); *United States v. Lopez*, 514 U.S. 549, 564 (1995) ("[Education is an area] where States historically have been sovereign.")

[46] *See*, Section I, *supra*.

[47] *See*, Section I, *supra*.

a split in the circuits exists concerning what type of notice recipients must receive of those conditions. While this Court has ruled that jurisprudence plays as much a role in notice as the statutory language itself, some circuits do not consider jurisprudence.

This Court has reiterated many times that when Congress invokes the Spending Clause and places conditions upon States' acceptance of federal financial assistance, Congress "must speak with a clear voice," and do so "unambiguously" in order to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).[48]

Just this term, this Court confirmed the *Pennhurst* test by stating, "[a]s we have recognized that, '[t]here can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds].'" *Jackson v. Birmingham Board of Education*, __ U.S. __, 125 S.Ct. 1497, 1509 (2005) (*citing, Pennhurst*, 451 U.S. at 17).

In *Jackson,* this Court found, based upon the jurisprudence, that, "a reasonable school board would realize that institutions covered by Title IX cannot cover-up violations of that law by means of discriminatory retaliation." *Id.*

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[48] In *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), this Court held that the ability of Congress to legislate under the Spending Clause is similar to a contract: "[j]ust as a valid contract requires offer and acceptance of its terms, [t]he legitimacy of congress' power to legislate under the Spending Power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" (internal quotes omitted).

at 1510. This Court extensively considered its prior opinions to find notice of this condition.[49]

While Pace was decided three weeks prior to this Court's decision in *Jackson*, the *Pace* rationale cannot be squared with *Jackson*, for the *Pace en banc* decision found irrelevant any consideration of the jurisprudence.[50] In fact, the *en banc* majority crafted a test for notice unlike any other circuit. It held that, "under *Dole*, if the clear-statement requirement is met, the state is conclusively presumed to have 'known' that receipt of clearly conditioned federal funds requires the state to abide by the condition (i.e., waiver of Eleventh Amendment immunity)."[51] By applying this new test, the court held that Louisiana knowingly waived its immunity when it accepted federal financial assistance without considering the effect of jurisprudence upon notice of the conditions.

The Fifth Circuit's *presumption* of knowledge conflicts with both *Jackson*, and *Dole* and is not consistent with other circuit court opinions. Furthermore, *Jackson* cannot be distinguished through a claim that the statute there was ambiguous while the statute here was clear. When there is applicable and binding jurisprudence, that jurisprudence must be consulted to determine the impact of the statutory language.[52]

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[49] "[T]hus, the board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Jackson*, 125 S.Ct. at 1509.

[50] *Pace*, 403 F.3d at 284 (*en banc*), App. 23.

[51] *Pace*, 403 F.3d at 284 (*en banc*), App. 22.

[52] *See, Jackson*, ___ U.S. ___, 125 S.Ct. at 1509 (considering the Court's prior interpretations of Title IX); *Davis v. Monroe County Board*

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Regardless of the language used by Congress in 42 U.S.C. § 2000d-7 when the Fifth Circuit's *Coolbaugh* holding squarely held that Louisiana had no sovereign immunity to reserve, the state's acceptance of funds could not have been a "knowing" or "voluntary" waiver, for even if the state had rejected federal funds, it would have had no immunity under *Coolbaugh*. To simply bypass the importance of *Coolbaugh*, as the majority of the *Pace en banc* panel did, is to ignore the most basic interpretative tool courts have – the principal of *stare decisis*.

Not only is the Fifth Circuit's decision here not consistent with *Jackson*, but there are also decisions from the District of Columbia Circuit in *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004)[53] and the Third Circuit in *A.W. v. The Jersey City Public Schools*, 341 F.3d 234 (3rd Cir. 2003) which cannot be squared with *Jackson*. These circuits also did not consider the effect of the jurisprudence upon notice.

The Circuit Courts of Appeal are split on the proper analysis to employ in determining whether a state has notice of waiver requirements. The Second Circuit, in *Garcia v. S.U.N.Y. Health Services Center*, 280 F.3d 98 (2nd Cir. 2001), is in accord with the earlier panel decision in *Pace*, 325 F.3d 609 (2003) in holding that a state could not knowingly waive immunity which had already been abrogated. Both of these courts considered the applicable jurisprudence upon notice that the states received. After

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of Education, 526 U.S. 629, 659 (1999) (finding that a claim for deliberate indifference to sexual harassment exists under Title IX based upon prior interpretations of discrimination).

[53] This Court refused to grant a petition for writ of certiorari in *Barbour* which sought review of a similar issue presented here. *See, Washington Metro. Area Transit Auth. v. Barbour*, __ U.S. __, 125 S.Ct. 1591 (2005).

considering the jurisprudence upon notice these courts held that the recipient could not have known of the conditions placed upon federal financial assistance. This same argument was rejected by the *en banc* decision in *Pace*.

This Court's requirements of notice and knowing acceptance are heightened in cases such as this where Congress seeks to condition a waiver of the fundamental right of sovereign immunity upon receipt of federal financial assistance. "[E]very reasonable presumption against waiver" must be indulged as courts "do not presume acquiescence to the loss of fundamental rights." *College Savings Bank*, 527 U.S. at 682 (citations omitted). "Only if the totality of the circumstances . . . reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the . . . rights have been waived." *See, Moran v. Burbine*, 475 U.S. 412, 421 (1986).

"The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank*, 527 U.S. at 682. "[W]aiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. at 421 (1986).

When this Court's jurisprudence concerning waiver of fundamental rights is considered in connection with this Court's jurisprudence concerning notice of conditions, it is clear that the relevant jurisprudence cannot be ignored when determining notice. Many circuits do not take into account jurisprudence when considering notice. The State of Louisiana urges this Court to consider this issue and instruct the circuits that they must consider how jurisprudence affects notice of conditions placed upon federal aid.

CONCLUSION

This case presents for decision an important evolving question of constitutional law that directly affects claims and potential claims that may be asserted against all states. The Court here has an opportunity to squarely address whether Congress may use its spending power to condition a waiver of sovereign immunity upon receipt of federal financial assistance. The Court is also squarely presented with an opportunity to rule whether *Dole's* statement about coercion is to be given substance by the creation of a test to measure coercion or whether it is to remain mere language that lower courts can always find not applicable, without reliance upon any test.

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403 F.3d 272

United States Court of Appeals,
Fifth Circuit.
Travis PACE, Plaintiff-Appellant,
v.
The BOGALUSA CITY SCHOOL BOARD,
Louisiana State Board of Elementary and
Secondary Education, the Louisiana Department
of Education, and the State of
Louisiana, Defendants-Appellees.
No. 01-31026.

March 8, 2005.
As Revised March 16, 2005.

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Appeal from the United States District Court for the Eastern District of Louisiana.

Before *KING*, Chief Judge, and *JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE*, GARZA, *DeMOSS, BENAVIDES, STEWART, DENNIS* and *PRADO*, Circuit Judges.[1]

W. EUGENE DAVIS and *WIENER*, Circuit Judges:

Travis Pace (Pace) appeals the district court's dismissal of his claim under the Individuals with Disabilities Education Act (IDEA) and the district court's order granting summary judgment in favor of defendants on Pace's claims under Title II of the Americans with Disabilities Act (ADA or Title II) and § 504 of the Rehabilitation Act (§ 504). The panel of this court which considered Pace's appeal concluded that the State of Louisiana, the Louisiana Department of Education and the Louisiana State Board of Elementary and Secondary Education (State

[1] Judge Clement recused herself and did not participate in this decision.

Defendants) were entitled to sovereign immunity under the Eleventh Amendment from all of Pace's claims. The panel then affirmed the district court's dismissal of Pace's claims against the Bogalusa City School Board. We took this case en banc, first to consider whether the state defendants were entitled to immunity from Pace's claims under the Eleventh Amendment and, second, to consider the merits of Pace's claims under the IDEA, ADA and § 504. For the reasons discussed below, we now conclude that the State waived its right to immunity under the Eleventh Amendment and therefore the State defendants are not entitled to immunity from Pace's § 504 and IDEA claims. On the merits, we conclude that the district court did not err in dismissing Pace's IDEA claims and that the district court correctly concluded that the dismissal of Pace's IDEA claims precluded his inaccessibility claims under the ADA and § 504. We reject Pace's argument that because different legal standards control his inaccessibility claims under ADA/504, those claims were not litigated in his IDEA action. A 1997 amendment and implementing regulations to the IDEA expressly require schools to comply with the identical standards for new construction that ADA/504 and their regulations require.

I. FACTUAL AND LEGAL BACKGROUND

The factual and procedural background of this case is accurately and succinctly presented in the panel opinion:

> In 1994, at the age of fifteen, Travis Pace (Pace) was enrolled at Bogalusa High School. He is developmentally delayed, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In July 1997, Pace's mother requested a due process hearing under the Individuals with Disabilities Education Act

(IDEA), 20 U.S.C. § 1400, et seq., as she believed that Pace was denied a "free appropriate public education" (FAPE) due to a lack of handicap accessible facilities at Bogalusa High School and deficiencies in Pace's "individualized education programs" (IEPs). The hearing officer found that the Bogalusa City Schools System[2] provided Pace with a FAPE in compliance with the IDEA, and the State Level Review Panel (SLRP) affirmed the hearing officer's decision.

In September 1997, Pace filed a complaint with the Office for Civil Rights of the Department of Education (OCR), alleging violations of § 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. The OCR and BCSB resolved allegations that the BCSB operated services, programs, and activities that were physically inaccessible to or unusable by individuals with disabilities by entering into a voluntary written agreement under which the BCSB would identify accessibility barriers and the OCR would oversee the development of a compliance plan.

In March 1999, Pace filed suit in federal district court, seeking damages and injunctive relief against the BCSB, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of the IDEA, the ADA, § 504 of the Rehabilitation Act, 42 U.S.C. § 1983, and various state statutes.[3]

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[2] The hearing examiner made hearings with regard to the Bogalusa City Schools System. In federal court, Pace brought suit against the Bogalusa City School Board. For all practical purposes, these two entities are the same and will be referred to as "BCSB."

[3] We do not consider Pace's § 1983 claim and state law claims because he did not brief them on appeal. *L & A Contracting Co. v.*

(Continued on following page)

The district court bifurcated Pace's IDEA and non-IDEA claims. In separate orders, it affirmed the SLRP decision by dismissing Pace's IDEA claims, then granted the defendants' motions for summary judgment on Pace's non-IDEA claims. Pace appeals both decisions.

II. STATE IMMUNITY UNDER THE ELEVENTH AMENDMENT

We consider first the defendants' arguments that they are entitled to sovereign immunity from Pace's claims under the Eleventh Amendment. At the core of this Eleventh Amendment dispute is the question whether, when Louisiana accepted particular federal funds, it waived the immunity afforded it by the Eleventh Amendment to suits under § 504 and the IDEA.[4]

A. THE TEXT AND FUNCTION OF THE ELEVENTH AMENDMENT

We start, as always, with the text. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

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S. Concrete Servs., Inc., 17 F.3d 106, 113 (5th Cir.1994); F.R.A.P. 28(a)(9)(A).

[4] The waiver argument does not apply to Title II because the ADA does not condition the receipt of federal funds on compliance with the Act or waiver of Eleventh Amendment immunity. Rather, Title II applies to public entities regardless of whether they receive federal funds. *See* 42 U.S.C. § 12132.

> States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[5]

These forty-three words – adopted in swift response to the Supreme Court's holding in *Chisholm v. Georgia*[6] that Article III permitted a state to be sued in federal court[7] – protect states from such litigation.[8] The protection thus afforded, however, has long since been expanded beyond the plain text of the Amendment. "Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state," the Supreme Court's interpretation of the Amendment has "recognized that the Eleventh Amendment accomplished much more."[9] The immunity afforded to states under the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the States."[10] Therefore, at its core, the Eleventh Amendment serves "as an essential component of our constitutional structure."[11]

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[5] U.S. Const. amend. XI.

[6] 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793).

[7] *See United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 286 n. 9 (5th Cir.1999) ("The Supreme Court's interpretation of Article III powers in *Chisholm*, prompted Congress' 'outraged reversal' of that decision through enactment of the Eleventh Amendment.") (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 99 (1985)).

[8] For present purposes, we ignore any role the Eleventh Amendment plays in regulating whether states may be sued in state courts.

[9] *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999).

[10] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

[11] *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989).

Nevertheless, Eleventh Amendment immunity is not absolute. A number of different circumstances may lead to a state's litigating in federal court absent Eleventh Amendment immunity. We begin with an overview of the Court's current framework for assessing when a suit against a state may proceed in federal court.

B. EXCEPTIONS TO ELEVENTH AMENDMENT IMMUNITY

There are two fundamental exceptions to the general rule that bars an action in federal court filed by an individual against a state. First, a state's Eleventh Amendment immunity may be *abrogated* when Congress acts under § 5, the Enforcement Clause of the Fourteenth Amendment.[12] Second, a state may *consent* to suit in federal court.[13]

1. Abrogation under § 5 of the Fourteenth Amendment

Congress can single-handedly strip the states of their Eleventh Amendment immunity and thereby authorize federal court suits by individuals against the states. When Congress does this, it is exercising its power to abrogate Eleventh Amendment immunity. In *Reickenbacker v.*

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[12] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[13] The term "abrogation" is not synonymous with "consent" or "waiver." When a state consents to suit or waives its Eleventh Amendment immunity, it knowingly and voluntarily forfeits the immunity's protections. In contrast, when Congress acts under its Fourteenth Amendment power to *abrogate*, the state has no choice.

Foster,[14] we examined the Supreme Court's cases concerning congressional abrogation of Eleventh Amendment immunity under § 5 of the Fourteenth Amendment and derived the following test for determining whether a federal statute is a valid exercise of Congress's power to enforce the Fourteenth Amendment and, consequently, whether the statute abrogates Eleventh Amendment immunity: (1) The statute must contain an unequivocal statement of congressional intent to abrogate; (2) Congress must have identified a history and pattern of unconstitutional action by the states; and (3) the rights and remedies created by the statute must be congruent and proportional to the constitutional violation(s) Congress sought to remedy or prevent.[15] If these three requirements are satisfied, states are subject to federal jurisdiction in suits under the statute adopted pursuant to § 5, regardless of any absence of consent.

2. *Waiver of Immunity by Consent*

Either in the absence of § 5 abrogation or in addition to it, a state always has the prerogative of foregoing its protection from federal court jurisdiction under the Eleventh

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[14] 274 F.3d 974 (5th Cir.2001). The continuing validity of *Reickenbacker* following the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), is uncertain. At the very least, its holding has been overruled as to Title II claims implicating a person's fundamental right of access to the courts. In addition, after *Lane* we do not look solely at the state level for a history and pattern of unconstitutional action; we also examine discrimination by nonstate government entities. *Lane*, 124 S.Ct. at 1991 n. 16.

[15] *Id.* at 977, 981-83.

Amendment.[16] A state's consent to suit must be both *knowing* and *voluntary.* That consent must always be "knowing and voluntary" follows from *College Savings Bank,* in which the Supreme Court cited *Johnson v. Zerbst,* to define what constitutes effective waiver.[17] Waiver is effective when it is the "intentional relinquishment or abandonment of a known right or privilege."[18] The first part, "intentional relinquishment," captures the principle of *voluntariness;* and the second part, "known right or privilege," captures the element of *knowingness.*

When Congress conditions the availability of federal funds on a state's waiver of its Eleventh Amendment immunity, we employ a five-prong test derived from the Supreme Court's definitive spending power case, *South Dakota v. Dole,*[19] to ascertain the validity of the waiver. In *Dole,* South Dakota challenged a congressional statute that conditions the states' receipt of federal highway funds on their adoption of the minimum drinking age of twenty-one. South Dakota argued that the statute exceeded

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[16] *College Savings Bank,* 527 U.S. at 670, 119 S.Ct. 2219; *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 267, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) ("[A] State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it."); *Great N. Life Ins. Co. v. Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121 (1944) ("The immunity may, of course, be waived."); *Clark v. Barnard,* 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.").

[17] 527 U.S. at 682, 119 S.Ct. 2219 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

[18] *Id.* (quoting *Zerbst,* 304 U.S. at 464, 58 S.Ct. 1019).

[19] 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

Congress's spending power and violated the Twenty-First Amendment.[20] The Court rejected this argument, noting that even though Congress is prohibited by the Twenty-First Amendment from directly regulating the distribution of alcoholic beverages, the Spending Clause authorizes it indirectly to entice states to raise their drinking age by dangling the proverbial carrot of federal dollars.[21]

Dole embodies an expansive interpretation of Congress's spending authority. Indirect persuasion is constitutional, reasoned the Court, because the spending power "is not limited by the direct grants of legislative power found in the Constitution."[22] Congress can, therefore, validly use its spending power to legislate conditions on the disbursement of federal funds *even though* those conditions would be unconstitutional if enacted as direct prohibitions.[23] It goes without saying that, because states have the independent power to lay and collect taxes, they retain

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[20] *Id.* at 205, 107 S.Ct. 2793.

[21] *Id.* at 206, 107 S.Ct. 2793. *See also New York v. United States,* 505 U.S. 144, 161-69, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (holding that although the Tenth Amendment prevents Congress from directly commandeering state officials into regulating radioactive waste, Congress can "hold out incentives to the States as a method of influencing a State's policy choices").

[22] *Dole,* 483 U.S. at 207, 107 S.Ct. 2793 (quoting *United States v. Butler,* 297 U.S. 1, 66, 56 S.Ct. 312, 80 L.Ed. 477 (1936)). *See also United States v. Lipscomb,* 299 F.3d 303, 319 (5th Cir.2002) ("Congress's spending power, like its power to tax, is 'to provide for the general welfare,' and is therefore untrammeled by the specific grants of legislative power found elsewhere in Article I, Section 8.") (citation omitted).

[23] *See Dole,* 483 U.S. at 206-07, 107 S.Ct. 2793; *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 203, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.").

the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds.

Nevertheless, Congress's power to effect policy through the exercise of its spending power is not unlimited. *Dole* announced the restrictions that control such exercise: (1) Federal expenditures must benefit the general welfare; (2) The conditions imposed on the recipients must be unambiguous; (3) The conditions must be reasonably related to the purpose of the expenditure; and (4) No condition may violate any independent constitutional prohibition.[24] In addition, the *Dole* Court recognized a fifth requirement that the condition not be coercive: "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[25]

Thus, *Dole* makes clear that, as long as its framework is employed, congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive. When the condition requires a state to waive its Eleventh Amendment immunity, *Dole*'s requirement of an unambiguous statement of the condition and its proscription on coercive inducements serve a dual role because they ensure compliance with *College Savings Bank*'s requirement that

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[24] *Id.* at 207-08, 107 S.Ct. 2793. *See also New York*, 505 U.S. at 171-72, 112 S.Ct. 2408.

[25] 483 U.S. at 211, 107 S.Ct. 2793 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)).

waiver of Eleventh Amendment immunity must be (a) knowing and (b) voluntary.

i. Clear Statement: "Knowing"

In *Pennhurst State Sch. & Hosp. v. Halderman,*[26] the Court analyzed Congress's power to impose conditions on a state's receipt of federal funds and pronounced:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . *By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly,* cognizant of the consequences of their participation.[27]

Thus, we know that this stringent clear-statement rule ensures that when a state foregoes its Eleventh Amendment immunity in exchange for federal funds, it does so "knowingly."[28] In our reading of *Pennhurst,* the only "knowledge" that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, *not* a state's knowledge that it has immunity that it could assert. At bottom, we conclude that if Congress satisfies the clear-statement rule, the knowledge prong of the Spending Clause waiver analysis is fulfilled.

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[26] 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

[27] *Id.* at 17, 101 S.Ct. 1531 (emphasis added) (citations omitted).

[28] *See also Dole,* 483 U.S. at 207, 107 S.Ct. 2793.

ii. Non-Coercive: "Voluntary"

If the clear-statement rule is satisfied, a state's actual acceptance of clearly conditioned funds is generally voluntary. The only exception to this presumption arises if the spending program itself is deemed "coercive," for then a state's waiver is, by definition, no longer voluntary.

In summary, the Supreme Court has articulated two ways that a state can be subject to an individual's suit in federal court, regardless of the Eleventh Amendment. First, Congress may abrogate state immunity. Second, the state may waive its Eleventh Amendment immunity by consent. If waiver results from participation in a Spending Clause program, the program must be a valid exercise of Congress's spending power; the waiver condition must satisfy the clear-statement rule (thereby ensuring that the state's waiver is "knowing"); and the program must be non-coercive (automatically establishing that the waiver is "voluntary").

C. WAIVER OF ELEVENTH AMENDMENT IMMUNITY PURSUANT TO CONDITIONAL SPENDING PROGRAMS

Keeping firmly in mind the Court's current framework for analyzing when a state may be subject to suit in federal court, we turn to the particular facts and legal contentions of the instant case. The two statutory provisions at issue purport to have conditioned Louisiana's receipt of federal funds on its waiver of Eleventh Amendment immunity to suits under § 504 and the IDEA. Specifically, 42 U.S.C. § 2000d-7 conditions a state's receipt of federal money on its waiver of Eleventh Amendment

immunity to actions under § 504 and other federal anti-discrimination statutes:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[29]

Similarly, 20 U.S.C. § 1403[30] conditions a state's receipt of federal IDEA funds on its consent to suit under that Act.[31] Applying the framework set forth in *Dole,* we proceed to determine whether Louisiana validly waived its immunity when it accepted the conditioned federal dollars.

Louisiana does not dispute that the first and third prongs of the *Dole* analysis, i.e., whether the Spending

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[29] 42 U.S.C. § 2000d-7(a)(1). Congress enacted § 2000d-7 in response to *Atascadero,* in which the Court held that the Rehabilitation Act neither abrogated Eleventh Amendment immunity nor effectively conditioned states' receipt of federal funds on a waiver of that immunity. *Atascadero,* 473 U.S. at 245-47, 105 S.Ct. 3142. According to the Court, the statute did not contain a clear statement of congressional intent either to abrogate or to require a waiver. *Id.*

[30] 20 U.S.C. § 1403(a) reads as follows: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."

[31] The section was passed by Congress in response to *Dellmuth v. Muth,* 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). In *Dellmuth,* the Supreme Court held that the predecessor to the IDEA (the Education of the Handicapped Act) lacked a sufficiently clear statement of Congressional intent to abrogate Eleventh Amendment immunity to claims under the statute. *Id.* at 232, 109 S.Ct. 2397 The conditional-spending issue was not raised in the case.

Clause statute at issue was enacted in pursuit of the general welfare, and whether the condition is sufficiently related to the federal interest in the program funded,[32] are satisfied here. Consequently, we restrict our consideration to the three remaining prongs of the *Dole* test. Following prior panels of this court,[33] and every circuit (but one) that has made these inquiries, we conclude that the statutes at issue validly conditioned Louisiana's receipt of these federal funds on its waiver of Eleventh Amendment immunity.[34]

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[32] In its en banc brief, Louisiana mentioned a relatedness challenge to § 2000d-7, but that argument was not presented to the panel, and Louisiana's en banc brief fails to develop it beyond a bare assertion. Thus, Louisiana has waived its relatedness challenge. *See L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir.1994); Fed. R.App. P. 28(a)(9)(A); *cf. Koslow v. Pennsylvania*, 302 F.3d 161, 175-76 (3d Cir.2002) (rejecting a relatedness challenge to the validity of a state's conditional-spending waiver of immunity to § 504 suits).

[33] *E.g., Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir.2000) ("A state may waive its immunity by voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.") (citation and quotation marks omitted); *id.* at 875 (holding that "in enacting § 2000d-7 Congress permissibly conditioned a state university's receipt of [federal] funds on an unambiguous waiver of the university's Eleventh Amendment immunity, and that, *in accepting such funding, the university has consented to litigate private suits in federal court.*") (internal punctuation and citation omitted) (emphasis added). *Cf. AT&T Comm. v. BellSouth Telecom, Inc.*, 238 F.3d 636, 645 (5th Cir.), *reh'g en banc denied*, 252 F.3d 437 (2001) ("[A]fter *College Savings*, Congress may still obtain a non-verbal voluntary waiver of a state's Eleventh Amendment immunity, if the waiver can be inferred from the state's conduct in accepting a gratuity after being given clear and unambiguous statutory notice that it was conditioned on waiver of immunity.").

[34] Eight circuits have reached this conclusion in § 504 cases. *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 129-30 (1st Cir.2003); *A.W.*

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First, we determine whether the conditions contained in 42 U.S.C. § 2000d-7 and 20 U.S.C. § 1403 are unambiguous and, consequently, whether Louisiana knowingly waived its immunity to actions under § 504 and the IDEA by accepting federal funds.

1. *Is the Clear-Statement Rule Satisfied Absent Use of the Words "Waiver" or "Condition"?*

In the face of the unequivocal language of § 2000d-7 to the effect that "[a] state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of § 504 of the Rehabilitation Act of 1973,"[35] Louisiana argues legalistically that, because Congress did not use the words "waiver" or "condition," the condition fails the clear-statement rule.[36] This argument – that absent talismanic

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v. Jersey City Pub. Schs., 341 F.3d 234, 244-51 (3d Cir.2003); *Bruggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir.2003); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292-93 (11th Cir.2003) (per curiam); *Lovell v. Chandler*, 303 F.3d 1039, 1051-52 (9th Cir.2002); *Koslow*, 302 F.3d at 172; *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir.2002); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir.2001); *Jim C. v. Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir.2000) (en banc); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir.2000). Other courts of appeals have reached the same conclusion for the other predicate statutes of § 2000d-7. *See, e.g., Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-55 (7th Cir.2001) (Title IX); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir.1999) (Title VI), *rev'd in part on other grounds*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir.1999) (Title IX). Circuits have reached this conclusion about the IDEA, as well. *See, e.g., M.A. ex rel. E.S. v. State-Operated School Dist.*, 344 F.3d 335, 351 (3d Cir.2003); *Oak Park Bd. of Educ. v. Kelly E.*, 207 F.3d 931, 935 (7th Cir.2000).

[35] 42 U.S.C. § 2000d-7 (2000).

[36] In its amicus brief, the State of Texas points to other statutes that have used such terms.

incantations of magic words, there can be no waiver – is little more than frivolous.[37] The Supreme Court has already noted, albeit in dicta, that in § 2000d-7 "Congress sought to provide the sort of unequivocal waiver that our precedents demand."[38] More importantly, our decision in *Pederson v. Louisiana State University,* which we remain convinced was correctly decided, forecloses this line of attack.[39]

2. *Does the Presence of Abrogation Language Preclude a Finding of Waiver?*

Louisiana also argues that because § 2000d-7 and § 1403 fail as § 5 attempts by Congress to *abrogate* Eleventh Amendment immunity, the same provisions of those statutes cannot satisfy the clear-statement rule for Spending Clause purposes. We reject Louisiana's attempt to pigeonhole this statutory language in mutually exclusive terms.

We held in *Pederson* that, in § 2000d-7, Congress "successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment

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[37] *Cf. Woods v. Cloyd W. Miller Co.,* 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

[38] *Lane v. Pena,* 518 U.S. 187, 198, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). *See also id.* at 200, 116 S.Ct. 2092 (noting "the care with which Congress responded to ... *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity").

[39] 213 F.3d at 875-76 (adopting the holding and reasoning of *Litman v. George Mason Univ.,* 186 F.3d 544 (4th Cir.1999)).

Immunity."[40] And in *Lesage v. Texas,*[41] we ruled that "Congress unquestionably enacted 42 U.S.C. § 2000d-7 with the 'intent' to invoke the Fourteenth Amendment's congressional enforcement power. The purpose of the provision, enacted in 1986, was to legislatively overrule the result in *Atascadero.*"[42] Thus, in *Pederson,* we recognized § 2000d-7 as a clear statement for *waiver* vis-à-vis the Spending Clause, and in *Lesage*, we recognized that the very same provision could satisfy *abrogation* under § 5 of the Fourteenth Amendment.

Just because particular language may or may not function with equal efficacy under both exceptions to Eleventh Amendment immunity, does not mean that it fails the clear-statement rule. As we concluded in *AT&T*, the rule requires only that "the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to federal court suits brought by individuals."[43] Congress need not declare in the statute whether it is proceeding under abrogation or waiver, or both. For the purpose of the clear-statement rule, § 2000d-7 – janus-faced as it may be – poses no constitutional impediment to our finding valid waiver by consent. We conclude that the conditions contained in § 2000d-7 and § 1403 are unambiguous, as required by *Dole.*

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[40] 213 F.3d at 876.

[41] 158 F.3d 213 (5th Cir.1998), *overruled on other grounds,* 528 U.S. 18, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999).

[42] *Id.* at 218. *See also United States v. Wells,* 519 U.S. 482, 495, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (reiterating the baseline presumption that Congress expects its statutes to be read in conformity with the Supreme Court's precedents).

[43] 238 F.3d at 644.

Undaunted, Louisiana still contends that it did not knowingly waive its Eleventh Amendment immunity. Louisiana and the dissent rely on *Garcia v. S.U.N.Y. Health Sciences Ctr.*,[44] which looked to the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*[45] to justify departing from the heavy weight of authority supporting waiver based on the clarity of the language in § 2000d-7. *Garrett* examined whether, in Title I of the ADA, Congress could constitutionally abrogate the states' Eleventh Amendment immunity.[46] The *Garrett* Court concluded that Title I of the ADA was outside the scope of valid § 5 legislation; therefore, Congress's attempt at abrogation failed, and private suits against states in federal court were barred by the Eleventh Amendment.[47]

The lawsuits in *Garcia* involved disputes that arose between September 1993 and August 1995.[48] During that pre-*Garrett* period, it was universally accepted that the ADA validly abrogated Eleventh Amendment immunity. Rather than looking at the clear-statement rule and the state's acceptance of funds, *Garcia* analyzed whether a state would have realized – "known" – that it was abandoning its Eleventh Amendment immunity by accepting federal funds during the period of time applicable to the lawsuits at issue there (and here).[49] The *Garcia* court noted that, during the relevant period, "Title II of the ADA

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[44] 280 F.3d 98 (2d Cir.2001).

[45] 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

[46] *See id.* at 365-74, 121 S.Ct. 955.

[47] *Id.* at 374, 121 S.Ct. 955.

[48] *Garcia*, 280 F.3d at 114 n. 4.

[49] *Id.* at 114.

was reasonably understood to abrogate [the state's] sovereign immunity under Congress's Commerce Clause authority."[50] The court also pointed out that the requirements of Title II and § 504 are "virtually identical."[51] Therefore, concluded the court, because the state defendant thought that it could be sued under Title II, it had nothing to lose by accepting federal funds and redundantly waiving immunity to § 504 suits in the process.[52]

Louisiana and the dissent maintain that we should follow the panel and apply the "logic" of *Garcia* to the instant case. First, Louisiana contends that, because it "believed" that the Rehabilitation Act had already abrogated its Eleventh Amendment immunity, it "did not and could not know that [it] retained any sovereign immunity to waive by accepting conditioned federal funds."[53] Likewise, Louisiana asks us to conclude that § 1403 was an unsuccessful attempt at abrogation; therefore, maintains Louisiana, it could not have "knowingly" waived its immunity under the IDEA when it accepted federal IDEA funds.

Even though it found that the statutory provisions at issue are unambiguous,[54] the panel nevertheless concluded that Louisiana's purported waivers of Eleventh Amendment immunity are invalid because they were not knowing. The panel drew support from the holding in *Garcia,* but its reasoning differed slightly from the Second Circuit's. According to the panel opinion, "[b]elieving that [the

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Pace,* 325 F.3d at 616.

[54] *Id.* at 615.

Rehabilitation Act and the IDEA] validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds."[55]

The fatal flaw with that syllogism lies in the fact that neither the mandates of the Rehabilitation Act nor the requirements of the IDEA apply to a state agency that has not received either some federal funding (in the case of the Rehabilitation Act) or federal IDEA dollars (in the case of the IDEA).[56] Therefore, it is impossible for Congress to have "abrogated" a state's immunity to § 504 or IDEA suits if the relevant state agency did not receive federal funds during the time period in which it was alleged to have violated an individual's statutory rights. It follows indisputably that Louisiana's Eleventh Amendment immunity to § 504 and IDEA claims was intact before the state accepted federal funds. Thus, Louisiana *did have* Eleventh Amendment immunity to waive by accepting the clearly conditioned federal funds.

The dissent nevertheless insists that, during the time that § 504 and the IDEA were thought to abrogate Eleventh Amendment immunity, Louisiana could have believed that it lacked immunity to § 504 and IDEA suits even before it received federal funds under those statutes.[57] This

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[55] *Id.* at 616.

[56] *See* 29 U.S.C. § 794(a) (prohibiting discrimination against the disabled through "any program or activity receiving Federal financial assistance"); 20 U.S.C. §§ 1412, 1415 (conditioning state agencies' receipt of federal funds on compliance with the requirements of the IDEA).

[57] *Post* at 301 ("[T]he State acted quite rationally in assuming between 1996 and 1998 that it had no sovereign immunity to waive

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ignores the conditional-spending nature of the Rehabilitation Act and the IDEA. The Acts' substantive provisions regulate *only* state agencies that have accepted the relevant federal funds. Thus, it makes no sense to say that the State was subject to private actions for damages under § 504 and the IDEA *before* the substantive provisions of those statutes applied to it. Contrary to the dissent's accusation,[58] we do not confuse the doctrines of abrogation and waiver; rather, we point out that – even before *Garrett* – Louisiana could have avoided suits under § 504 and the IDEA altogether by declining federal funding. Louisiana clearly had Eleventh Amendment immunity to waive at the time that it accepted the federal funds and expressly obligated itself to comply with the dictates of the Rehabilitation Act and the IDEA.

Further, during the relevant time period, §§ 2000d-7 and 1403 put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity. Under *Dole,* if the clear-statement requirement is met, the state is conclusively presumed to have "known" that receipt of clearly conditioned federal funds requires the state to abide by the condition (i.e., waiver of Eleventh Amendment immunity).

In addition, the *Garcia* approach is problematic for a number of reasons, the most fundamental of which is that, by focusing its inquiry on what the state could have believed, the Second Circuit engrafted a subjective-intent element onto the otherwise objective Spending Clause

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when it accepted federal education funds under conditions specified by § 504 and IDEA.").

[58] *Post* at 301 & n.7.

waiver inquiry. In other words, *Garcia*'s approach employs the wrong jurisprudential test, because it distorts what is necessary to show knowledge for Spending Clause waivers. Analytically, the "knowledge" question that we ask when we undertake the Spending Clause waiver inquiry is coextensive with the clear-statement rule; for, when a state *actually* accepts funds that are clearly conditioned on a waiver of Eleventh Amendment immunity, it is held objectively to "know" that it is accepting *all* clearly stated conditions. That it might not "know" subjectively whether it had any immunity to waive by agreeing to those conditions is wholly irrelevant.

The dissent asserts that, by focusing on the clear-statement requirement, we have disregarded *College Savings Bank*'s "clear declaration" requirement. But *College Savings Bank* was not a conditional-spending case. There, the Court invalidated "constructive waivers" of Eleventh Amendment immunity "based upon the State's mere presence in a field subject to congressional regulation."[59] Such a constructive waiver is a far cry from a state's acceptance of federal funds that are explicitly conditioned on its waiver of Eleventh Amendment immunity. In fact, the *College Savings Bank* opinion expressly distinguished conditional-spending waivers of Eleventh Amendment immunity, which it said were "fundamentally different from" illegitimate constructive waivers.[60] Nothing in *College Savings Bank* indicates that, when the clear-statement requirement is met, a state can be said to lack

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[59] *College Savings Bank*, 527 U.S. at 680, 119 S.Ct. 2219.

[60] *Id.* at 686, 119 S.Ct. 2219.

knowledge that by accepting federal funds it waives its Eleventh Amendment immunity.

In sum, *Garcia* and the dissent would subjugate the bright-line of objective reasoning to the slippery slope of assessing a state's subjective belief.[61] If, like the panel, we were to follow that approach, we would be getting into the business of looking past the straightforward objective facts, i.e., (1) the clear statement requiring waiver and (2) the state's actual, uncoerced acceptance of federal funds, in an attempt to fathom what was in a state's "head," a precarious exercise indeed. The clear-statement rule guards against post hoc questions about intent.

Accordingly, we hold that Louisiana's waiver of Eleventh Amendment immunity to actions under § 504 and the IDEA was knowing.[62] Still, we must determine whether an independent constitutional bar prevents Congress from conditioning the receipt of federal funds on a state's waiver of Eleventh Amendment immunity.

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[61] *See Lapides v. Bd. of Regents,* 535 U.S. 613, 621, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear.").

[62] Since the *Pace* panel opinion was issued, five circuits have expressly rejected its approach, which the dissent continues to advocate. *See Nieves-Marquez,* 353 F.3d at 129-30 (First Circuit); *A.W.,* 341 F.3d at 244-52 (Third Circuit); *Shepard v. Irving,* 77 Fed.Appx. 615, 619 n. 2 (4th Cir.2003) (unpublished); *Doe v. Nebraska,* 345 F.3d 593, 600-604 (8th Cir.2003); *Garrett,* 344 F.3d at 1292-93 (Eleventh Circuit). *See also Koslow,* 302 F.3d at 172 n. 12 (explaining that "the 'clear intent to condition participation in the programs funded,' required by *Atascadero,* 473 U.S. at 247, 105 S.Ct. 3142, ensured the Commonwealth of Pennsylvania knew that by accepting certain funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities").

3. *Can Congress Condition Waiver of Eleventh Amendment Immunity When It Exercises its Spending Power?*

Louisiana challenges Congress's power under the Spending Clause to condition receipt of federal education funds on a state's waiver of Eleventh Amendment immunity. This position is frivolous. We have consistently interpreted Supreme Court guidance as permitting such conditional spending programs, as has every other circuit that has squarely addressed the issue.[63] We do not change course today.

4. *Is Conditioning Acceptance of Federal Funds a Violation of the Unconstitutional-Conditions Doctrine?*

Louisiana also attempts to invoke the "unconstitutional-conditions doctrine" to challenge Congress's ability to condition the acceptance of federal funds on waiver of Eleventh Amendment immunity. In the most general sense, the unconstitutional-conditions doctrine examines the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles.[64] For at least two reasons, Louisiana's

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[63] *See, e.g., Arecibo Cmty. Health Care, Inc. v. Puerto Rico,* 270 F.3d 17, 24-25 (1st Cir.2001); *Garcia,* 280 F.3d at 113; *Koslow,* 302 F.3d at 172; *Pederson,* 213 F.3d at 875-76; *Nihiser v. Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir.2001); *Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir.2000); *Jim C.,* 235 F.3d at 1081; *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 819, as amended, 271 F.3d 910 (9th Cir.2001); *Robinson,* 295 F.3d at 1189-90; *Sandoval,* 197 F.3d at 493.

[64] *See Frost v. Railroad Com. of Cal.,* 271 U.S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed. 1101 (1926) ("[T]he state . . . may not impose conditions which require the relinquishment of constitutional rights. . . . It is

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reliance on the unconstitutional-conditions doctrine is misplaced.

First, as evidenced by the dearth of cases employing it in this context,[65] the unconstitutional-conditions doctrine is most meaningful when the government imposes a condition of questionable constitutional character on an individual right. But here, federal and state sovereigns are on opposite sides of the controversy, and the constitutional "right" at issue is structural rather than personal. Consequently, for the reasons announced in the Third Circuit's analysis in *Koslow v. Commonwealth of Pennsylvania,* the doctrine is inapplicable. The *Koslow* court considered whether the Rehabilitation Act, including § 2000d-7, imposed an unconstitutional condition on Pennsylvania's receipt of federal funds. In refusing to apply the unconstitutional-conditions doctrine to the conditioning of federal funds on the waiver of Eleventh Amendment immunity, the Third Circuit stated:

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inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

[65] The only Supreme Court decision that has come close was *United States v. Butler.* In that 1936 decision, the Court invalidated provisions of the Agricultural Adjustment Act of 1933, which paid farmers to reduce their production of crops. 297 U.S. at 74-78, 56 S.Ct. 312. As the Tenth Circuit has explained, though, "that case relied on an overly narrow view of Congress' enumerated powers to determine that Congress had overstepped its authority." *Kansas v. United States,* 214 F.3d 1196, 1201 n. 6 (10th Cir.2000) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-b, at 836 (3d ed. 2000) ("[T]he Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power."). *Accord Lipscomb,* 299 F.3d at 319 (noting that the Supreme Court "quickly abandoned" the view espoused in *Butler*).

> [T]he Supreme Court has not yet applied the "unconstitutional conditions" doctrine to cases between two sovereigns. Unlike private persons, states have the resources to serve their citizens even if the federal government, through economic incentives, encourages a particular result. A state's political powers – not the least of which is the power to levy taxes on its citizens – help ensure the federal government does not "coerce" the state through economic "encouragement." An individual citizen, in contrast, lacks these formidable institutional resources.[66]
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> We embrace that reasoning.

Second, the unconstitutional-conditions doctrine, even when applied piecemeal by the Supreme Court, is anchored at least in part in a theory of coercion or compulsion.[67] In this context, that concern is subsumed in the non-coercion prong of the *Dole* test.[68] In other words, in the Spending Clause context, any role that the unconstitutional-conditions doctrine might have in cabining Congress's authority to give funds in exchange for waiving immunity is already part-and-parcel of the standard Spending Clause analysis. Thus, no independent constitutional bar invalidates Louisiana's waiver of Eleventh Amendment immunity.

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[66] 302 F.3d at 174 (citing *Frost & Frost*, 271 U.S. at 593, 46 S.Ct. 605; *New York*, 505 U.S. at 171-72, 112 S.Ct. 2408; *Dole*, 483 U.S. at 210-11, 107 S.Ct. 2793).

[67] *See id.* ("The 'unconstitutional conditions' doctrine is based on the proposition that government incentives may be inherently coercive."). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L.REV. 1415, 1428-55 (1989).

[68] *See supra* text accompanying note 24.

5. Are These Programs Coercive?

In light of *Dole,* we must determine whether the conditional-spending schemes at issue are unduly coercive. We hold that they are not. A state can prevent suits against a particular agency under § 504 by declining federal funds for that agency.[69] A state can avoid suit under the IDEA merely by refusing IDEA funds. And, to do so in either case, the state would not have to refuse all federal assistance.[70] Moreover, no circuit has accepted a coercion challenge to either the Rehabilitation Act or the IDEA.[71] Therefore, we refuse to invalidate Louisiana's waiver on coercion grounds.

D. ABROGATION OF IMMUNITY

Alternatively, Pace asks this en banc court to rule that Congress – acting under § 5 of the Fourteenth Amendment – in fact abrogated Louisiana's Eleventh Amendment immunity, leaving Louisiana subject to suit on Pace's ADA, Rehabilitation Act, and IDEA claims. As we hold that Louisiana waived its Eleventh Amendment immunity with respect to the Rehabilitation Act and the IDEA, it is not necessary for us to address Pace's contention that Louisiana's immunity to suit under those statutes was also abrogated. Neither is it necessary for us to consider whether Title II of the ADA abrogates Eleventh Amendment immunity in this case. First, the Supreme Court, in

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[69] *See* 29 U.S.C. § 794(b)(1).

[70] *See* 20 U.S.C. §§ 1411(a)(1), 1412, 1403.

[71] *See, e.g., Jim C.,* 235 F.3d at 1082 (rejecting a coercion challenge to the validity of a waiver of state Eleventh Amendment immunity to § 504 claims).

Tennessee v. Lane,[72] held that Title II abrogates sovereign immunity to the extent that it implicates the accessibility of judicial services, but refused to consider its application to other rights, including those considered to be fundamental under the Constitution.[73] Because (1) the Supreme Court has never before recognized access to public education[74] or freedom from disability discrimination in education[75] to be fundamental rights, and (2) it is unnecessary to address Pace's Title II claims given that its rights and remedies are identical to and duplicative of those provided in § 504, we do not address whether the holding in *Lane* extends to disability discrimination in access to public education.

Second, when ADA claims are directed at architectural barriers, as they are here, the rights and remedies are exactly the same as those provided under the Rehabilitation Act. This circuit, as well as others, has noted that, because the rights and remedies under both statutes are the same, case law interpreting one statute can be applied to the other.[76] The implementing regulations for § 504 and

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[72] 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004).

[73] *Id.* at 1993.

[74] *See Plyler v. Doe,* 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (although important, education is not a fundamental constitutional right).

[75] *Cf. City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (disability classifications are subject only to rational-basis scrutiny).

[76] *See Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.2000) (internal citations omitted) ("The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973, and Congress' intent was that Title II extend the protections of the Rehabilitation Act 'to cover all programs of state or local governments, regardless of the receipt of federal financial assistance' and that it 'work in the same

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Title II are, in all material respects, the same. For example, both statutes' implementing regulations prohibit similar types of discrimination.[77] In addition, § 504 and Title II's regulations governing new construction and alterations are effectively the same.[78] The two statutes are interpreted to provide the same exception: No covered entity is obligated to make a "fundamental alteration" in its programs.[79] Finally, the remedies available under § 504 and Title II are one and the same. Specifically, § 203 of Title II states that "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and

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manner as Section 504.' In fact, the statute specifically provides that '[t]he remedies, procedures and rights' available under Section 504 shall be the same as those available under Title II. Jurisprudence interpreting either section is applicable to both."); *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 n. 6 (7th Cir.1999) ("Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other."); *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir.1998) ("The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and 'cases interpreting either are applicable and interchangeable.'"); *McPherson v. Michigan High Sch. Ath. Ass'n*, 119 F.3d 453, 459-60 (6th Cir.1997) (en banc) (same).

[77] *Compare* 28 C.F.R. § 42.520, *with* 28 C.F.R. § 35.149. Similarly, § 504 and Title II's regulations regarding existing facilities are nearly identical. *Compare* 28 C.F.R. 42.521(a), *with* 28 C.F.R. 35.150(a).

[78] *Compare* 28 C.F.R. 42.522(a), *with* 28 C.F.R. 35.151(a).

[79] *Compare Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1995)(Section 504 does not require covered entities to make fundamental alterations in their programs); *with* 28 C.F.R. § 35.150(a)(2)-(3) (Title II does not require public entities to make fundamental alterations in the nature of a program, service, or activity). This requirement, however, does not excuse the failure to make altered or new facilities accessible. *Compare* 28 C.F.R. § 35.151(a)-(b), *with* 28 C.F.R. § 42.522(a).

rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [of the ADA]."[80] Section 505(a)(2) of the Rehabilitation Act, in turn, states that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available" for violations of § 504.[81] Thus, in *Barnes v. Gorman,*[82] the Supreme Court held that "the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI" of the Civil Rights Act.[83] For all intents and purposes, therefore, the remedies available to Pace under § 504 and Title II are the same. The sole difference between the statutes lies in their causation requirements.[84] This difference is not implicated, however, where, as here, the challenge is to architectural barriers.

In conclusion, we hold that for all the foregoing reasons, Louisiana is not entitled to assert sovereign immunity under the Eleventh Amendment in this case. With that issue determined, we proceed to the question of issue preclusion.

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[80] 42 U.S.C. § 12133.

[81] 29 U.S.C. § 794a(a)(2).

[82] 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

[83] *Id.* at 185, 122 S.Ct. 2097.

[84] *See Soledad v. U.S. Dept. of Treasury,* 304 F.3d 500 (5th Cir.2002).

III. MERITS

We turn now to the merits of Pace's arguments that the district court erred in denying relief to him under the IDEA, the ADA and § 504.

A. IDEA

We agree with and adopt that portion of the panel opinion affirming the district court's judgment which in turn affirmed the administrative determination that Pace was not entitled to relief under the IDEA.

We pause only to emphasize the somewhat unusual nature of a proceeding under the IDEA. As required by the statute,[85] Pace first pursued his administrative claim. He was granted a hearing by a hearing examiner where he had an opportunity to present his evidence demonstrating that the inaccessibility of various portions of the Bogalusa campus prevented him from receiving a free and appropriate public education (FAPE). The hearing examiner, after hearing the evidence and making a personal inspection of the campus, rejected Pace's inaccessibility claims and concluded that the defendants had complied with the IDEA and had provided a FAPE to Pace.[86] Pace then challenged the hearing examiner's findings and conclusion in his administrative appeal to the State Level Review Panel (SLRP). The SLRP also rejected Pace's claims and

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[85] *See* 20 U.S.C. 1415(*l*).

[86] The hearing examiner thoroughly reviewed the testimony and physical evidence presented to her and rejected in wholesale fashion Pace's various claims of inaccessibility. R. 94.

affirmed the hearing examiner in all respects.[87] Pace then filed suit in federal district court as authorized by 20 U.S.C. § 1415(i)(1)(A). A district court in which such an action is filed must receive the record generated by the administrative proceeding and also hear additional evidence presented by the parties.[88] The court must then give "due weight" to the hearing officer's finding and make a de novo determination based on a preponderance of the evidence. *Teague Independent School District v. Todd L,* 999 F.2d 127, 131 (5th Cir.1993). The district court considered all of Pace's claims of inaccessibility that he raised during the administrative proceedings.[89] The court considered the administrative record along with the new evidence offered by Pace and gave "due weight" to the findings of the hearing examiner and SLRP. Ultimately, the district court agreed with the hearing examiner that Bogalusa High School had provided Pace with a FAPE by

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[87] The language used by the SLRP also makes it clear that this review panel found absolutely no merit to Pace's inaccessibility claims. R. 64-65.

[88] *See* 20 U.S.C. § 1415(i)(2)(A) (Any party aggrieved by the findings and decisions . . . shall have the right to bring a civil action with respect to the complaint pursuant to this section, which action may be brought . . . in a district court of the United States . . .).

[89] Pace sought relief from the district court to remedy the school board's refusal to make the following areas accessible:

. bathroom facilities
. classrooms on the second rather than first floor of the school
. elevator access
. exiting classroom during fire drills
. cafeteria
. school health center
. auditorium
. music room
. insufficient parking spaces
. lack of ramps (accessible entrances)

complying with the IDEA in all aspects, including that the campus was accessible to the wheelchair-bound Pace. The district court's conclusion is fully supported by the record and we therefore affirm the district court's rejection of Pace's claims under the IDEA.

B. ADA AND SECTION 504

In addition to his IDEA claims, Pace also asserted claims under the ADA and § 504 in his suit. The district court severed the IDEA claims from these non-IDEA claims. After dismissing Pace's IDEA claims, the district court then considered defendants' motion for summary judgment seeking exoneration under § 504 and the ADA. The district court granted the defendants' motion for summary judgment on grounds that the factual bases for the non-IDEA claims were indistinct from the resolved IDEA claims. The district court concluded further that principles of issue preclusion applied to preclude Pace from pursuing his redundant non-IDEA claims. Pace argues that the district court committed legal error in applying principles of issue preclusion to bar his non-IDEA claims.

Issue preclusion or collateral estoppel is appropriate when: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision. *See Southmark Corp. v. Coopers & Lybrand (In re: Southmark Corp.)*, 163 F.3d 925, 932 (5th Cir.1999). In *Southmark* we also found that the "relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings." *Id.* (quoting *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir.1995)). Issues of fact are not "identical" or "the same,"

and therefore not preclusive, if the legal standards governing their resolution are "significantly different."[90] Pace argues that the accessibility issues the court litigated under the IDEA were for the limited purpose of determining whether the Bogalusa High School provided Pace with a FAPE under that statute. Thus, Pace contends, because a "significantly different" legal standard applies to his accessibility issues under the ADA and § 504, these latter claims were never litigated and issue preclusion should not apply. We therefore compare the standards of accessibility under the IDEA on the one hand and the ADA and § 504 on the other to determine whether the legal standards are "significantly different."

As indicated above, the IDEA requires states and local educational agencies receiving federal IDEA funds to make a FAPE available to children with certain disabilities between the ages of 3 and 21. The IDEA imposes extensive requirements on schools to safeguard the disabled child's right to a FAPE. 20 U.S.C. §§ 1414, 1415. In determining whether a school has provided a student with a FAPE, the focus is on the Individualized Education Plan (IEP), a written statement prepared by a team consisting of a representative of the local school district, the disabled

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[90] *See, e.g.*, 18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE 3d § 132.02[2][h] (3d ed.2001). Courts have used slightly differing language to express this idea that legal issues are not "identical" for issue preclusion purposes if they are significantly different. *Compare Raytech Corp. v. White*, 54 F.3d 187, 191 (3d Cir.1995) (the differences in the standards must be "substantial") *with Talcott v. Allahabad Bank, Ltd.*, 444 F.2d 451, 460 (5th Cir.1971) (the legal standards are not identical for issue preclusion purposes only when there is a "demonstrable difference" in the legal standards by which the facts are evaluated). For purposes of this appeal, these distinctions are irrelevant.

child's teachers, the child's parents and the child. 20 U.S.C. § 1414(d). The IEP includes the child's educational performance, his goals, the nature of his disabilities, and a description of the educational and related services that will be provided for the child to meet the stated objectives. The objective is always to tailor the FAPE to the particular needs of the child. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d 245, 247 (5th Cir.1997).

The goal of the IDEA is to require a FAPE that will permit the child "to benefit" from the educational experience. It need not be the best possible education nor one that will maximize the child's educational potential. *Bd. of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Admittedly different from those underlying the IDEA, the Congressional objective of both the ADA and § 504 is the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Title II of the ADA, which applies to public entities including public schools, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. *See also* 28 C.F.R. § 35.130(a). Section 504 contains virtually identical language. *See* 29 U.S.C. § 784(a). Mandating physical accessibility and the removal and amelioration of architectural barriers is an important purpose of each statute.[91]

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[91] *See* 42 U.S.C. § 12101(a)(5) ("The Congress finds that ... individuals with disabilities continually encounter various forms of

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The primary difference between the ADA and § 504 is that § 504 applies only to recipients of federal funds. 29 U.S.C. § 794(a). This difference does not concern us in this case because no defendant argues that it does not receive federal money. Thus, as we stated in section II-D above, for the purposes of this appeal, the ADA and § 504 and their implementing regulations impose identical obligations on the defendants and grant identical rights to Pace.[92]

In Pace's brief to us on his non-IDEA claims brought under § 504 and the ADA he complains only that parts of the Bogalusa High School campus are inaccessible to him. The only § 504 regulations dealing with accessibility in education are found in subpart C of the § 504 regulations. 34 C.F.R. §§ 104.21-104.23. Section 104.23 of § 504's regulations deals with new construction on school campuses, the basis of Pace's complaints in this suit. Subpart D of the § 504 regulations deals with preschool, elementary, and secondary education and those regulations do not purport to cover accessibility in schools.[93] Rather, 34 C.F.R. §§ 104.21-23, the general education regulations on accessibility found in subpart C of § 504

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discrimination, including . . . the discriminatory effects of architectural . . . barriers, . . . failure to make modifications to existing facilities[,] . . . segregation, and relegation to lesser services, programs, [and] activities . . . "); *Id.* § 12101(a)(4) ("The Congress finds that . . . discrimination against individuals with disabilities persists in such critical areas as education . . . "); *Alexander v. Choate,* 469 U.S. 287, 297, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (noting that the "elimination of architectural barriers was one of the central aims of the Rehabilitation Act").

[92] *See* note 78, *supra.*

[93] Subpart D in the regulations to § 504 includes general regulations for preschool, elementary, and secondary education regarding placement (34 C.F.R. § 104.35), procedural requirements (34 C.F.R. § 104.36) and the general FAPE requirement (34 C.F.R. § 104.33).

apply to new construction on high school campuses such as Bogalusa High.[94] The ADA has no specific section on education, so the general regulations governing accessibility to public buildings also control accessibility to school buildings.

With this background, we turn to Pace's specific argument that his accessibility claims under the ADA/504 are not precluded by the district court's rejection of his accessibility claims under the IDEA. He argues that his non-IDEA accessibility claims are not precluded because different legal standards apply to his ADA and § 504 accessibility claims, and these claims have never been litigated or decided. When we consider the equivalent standards for accessibility in schools under the IDEA on the one hand and the ADA/504 on the other, it becomes clear that we should reject this argument.

Congress required in a 1997 amendment to the IDEA that any construction of new facilities must comply with either (1) The Americans with Disabilities Accessibility Guidelines for Buildings and Facilities (ADAAG); or (2) The Uniform Federal Accessibility Standards (UFAS). 20

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[94] Although it is illogical to do so, one can read the § 504 regulations to say that a school need not comply with accessibility requirements in Subpart C to provide a § 504 FAPE under 104.33 when a student complains that part of a school's campus is inaccessible. In such a situation, it is more sensible to read these regulations as requiring a school's compliance with subpart C's accessibility requirements before it can be said to provide a § 504 FAPE. Regardless of whether the accessibility requirements must be met before a § 504 FAPE is provided, subpart C of the § 504 regulations clearly requires new construction in the school to meet the regulation's accessibility requirements.

U.S.C. § 1404(b).[95] Thus, with respect to a physically disabled child such as the wheelchair-bound Pace, the school can comply with the IDEA's accessibility requirements by satisfying either the ADAAG or UFAS.[96]

Pace presents no argument that the accessibility standards for new construction of school buildings under the ADA or § 504 are more demanding or even different from the standards required under the 1997 amendment to the IDEA. This is understandable, because the regulations governing accessibility in schools under the ADA/504 require a school engaged in new construction to conform to the same standards as the IDEA, either the ADAAG or UFAS.

New construction and alterations of public facilities under Title II of the ADA are governed by the regulations found in 28 C.F.R. § 35.151.[97] Like the IDEA, the ADA

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[95] 20 U.S.C. § 1404(b) provides in pertinent part:

> . . . Any construction of new facilities or alteration of existing facilities under subsection (a) of this section shall comply with the requirements of –
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> (1) appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the "Americans with Disabilities Accessibility Guidelines for Buildings and Facilities"); or
>
> (2) appendix A of part 101-19.6 of title 41, Code of Federal Regulations (commonly known as the "Uniform Federal Accessibility Standards").

[96] The corresponding regulation to 20 U.S.C. § 1404 is found at 34 C.F.R. § 300.756 and is identical.

[97] 38 C.F.R. 35.151(c) provides in pertinent part:

> (c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) . . . or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) . . .

(Continued on following page)

accessibility regulations require a school conducting new construction to comply with either the ADAAG or UFAS. Section 504's accessibility regulations are virtually identical to the ADA's,[98] and also demand that schools engaging in new construction comply with the same federal guidelines required by the IDEA. Thus, Pace's argument that the accessibility standards are different under IDEA and ADA/504 is meritless.

In summary, under the IDEA, when, as here, a child complains that his disability renders a portion of the campus inaccessible, this triggers the application of the 1997 amendments to the IDEA. In determining whether the school has met its obligations under the amendment and provided the disabled student with a FAPE, the hearing examiner, the SLRP, and the district court must determine whether the area of the school in question complies with either the ADAAG or UFAS. These are the same federal guidelines the school must comply with to satisfy the accessibility requirements of the ADA and § 504.

Pace, as he was required to do by the IDEA, presented his accessibility claims in his administrative claim. In their administrative findings, both the hearing examiner and the SLRP discussed the 1997 amendment to the IDEA. This makes it clear that both were aware that new or existing construction to Bogalusa High School must

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shall be deemed to comply with the requirements of this section with respect to those facilities . . .

[98] One minor difference between the accessibility regulations under § 504 and the ADA is that, because § 504 preceded the ADA and the ADA-specific accessibility regulations (ADAAG), § 504 does not give schools the option of complying with either the ADAAG or UFAS (as do both the ADA and IDEA), but requires compliance with the UFAS.

meet either the ADAAG or UFAS standards before the school could fully comply with the IDEA.[99]

The only significant summary judgment evidence Pace presented to the district court on his ADA/504 claims was the report and deposition testimony of Donald MaGinnis, an architectural expert. The point of his testimony is that structural changes to the Bogalusa campus failed to comply with the ADAAG. Although this same standard applied to Pace's claim under the IDEA, he did not introduce this evidence before the hearing examiner. Further, Pace failed to offer the expert evidence to the district court to support his appeal of the administrative determination under the IDEA. Because the accessibility standards under the IDEA and the ADA/504 are identical for new construction of school buildings, Pace has not demonstrated that the defendants owed him any greater or even different obligation in this respect under § 504/ADA than he was entitled to under the IDEA. Thus, the accessibility issue Pace litigated in his IDEA case and lost is the same issue he sought to litigate in his ADA/504 claim. The district court correctly concluded that Pace was precluded from relitigating this issue.

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[99] Page five of the State Level Review Panel's opinion, under the heading "Applicable Law and Regulations," provides:

> Section 605 of the Individuals with Disabilities Education Act Amendments of 1997, states that any construction of new facilities or alteration of existing facilities with use of program funds shall comply with the requirements of Americans with Disabilities Accessibility Guidelines (Appendix A of Part 36 of Title 28, Code of Federal Regulations) or Uniform Federal Accessibility Standards (Appendix A of Part 101-19.6 of Title 41, Code of Federal Regulations). (R. 63).

The only argument Pace presents to us on the applicability of the 1997 amendment was presented for the first time in his petition for en banc review. He argued in that petition and argues to the en banc court that the amendment was not triggered because no evidence was presented that "IDEA funds" were used to make the improvements to the Bogalusa campus. Pace relies on the following language in the 1997 amendment to 20 U.S.C. § 1404:

> *§ 1404. Acquisition of equipment; construction or alteration of facilities*
>
> (a) In general
>
> If the Secretary determines that a program authorized under this chapter would be improved by permitting program funds to be used to acquire appropriate equipment, or to construct new facilities or alter existing facilities, the Secretary is authorized to allow the use of those funds for those purposes.

Neither the amendment nor the existing statute purports to require a plaintiff to prove the use of IDEA funds or any other fact as a predicate to seeking relief under the IDEA against a school for failing to make its campus accessible in response to a student's IEP. We have found no cases interpreting this amendment or its predecessor. Subsection (a) is simply a restyled version of the existing statute.[100] The change is found in Subsection (b),

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[100] The pre-amended version of 20 U.S.C. 1404(a) provided as follows:

> (a) Authorization for use of funds
>
> In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, the

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which incorporates into the IDEA for the first time the ADAAG and UFAS construction standards. The amended § 1404(a), like the existing statute, authorizes the Secretary to allow the use of IDEA funds for construction or alterations.

To support Pace's argument that the amended version of § 1404 does not apply in this case, amicus seems to argue that structural alterations to meet accessibility demands in a student's IEP are not part of the calculus in determining whether a student has received a FAPE.

In Weber's *Special Education Law and Litigation Treatise,* he rejects this suggestion in his cogent discussion of the interplay between the IDEA, § 504 and ADA:

> Schools covered by Title II and Section 504 owe obligations not only to students with disabilities but to all persons with disabilities whom they serve. In this sense, the laws are more inclusive than the Individuals with Disabilities Education Act (IDEA), whose beneficiaries are children with disabilities who need special education. Nevertheless, by requiring school districts to provide an appropriate education in the least restrictive environment, IDEA overlaps with Section 504 and Title II in terms of the children it covers. *Thus, IDEA may require a school district to modify programs or facilities to achieve these ends for an individual student. IDEA funds may be used for removal of architectural barriers or other improvements to accessibility in order to promote appropriate*

Secretary may authorize the use of such funds for such purposes. (West 1996).

education for children with disabilities. (Footnotes omitted)[101] (emphasis added)

Weber further describes a school's duty under the IDEA to address accessibility concerns in the IEP as "a component of appropriate special education and related services in the least restrictive environment."[102] This discussion makes it clear that when a student's IEP raises concerns of accessibility to the school's campus, the determination of whether these concerns have been met is a necessary component in resolving whether the student has received a FAPE.

The Hearing Examiner tried this controversy on the premise that the entire IDEA statute, including the 1997 amendment, applied to Pace's claims, and no one argued to the contrary. The Hearing Examiner did not require the parties to file extensive pre-trial papers. However, she did require each party to list the issues they wanted the hearing examiner to address. Neither Pace nor the school board asserted that an issue was presented with respect to the expenditure of IDEA funds or any other issue relating to the applicability of the 1997 amendment to § 1404. Considering the strict duty that the ADAAG and UFAS construction guidelines impose on the school, it was also reasonable for the Hearing Examiner to assume that the school board would object if there was some basis for it to argue that these guidelines did not apply to the architectural improvements ordered by Pace's IEP. It is not surprising

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[101] MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 7.1 (2D ED.2002).

[102] Weber, note 3 at 7.2. (Footnotes omitted). Weber concludes that "modifications [to the campus] may include wheelchair ramps, handrails, accessible toilets, and water fountains."

that Pace did not object to the Hearing Examiner's application of such rigorous standards; it was in his interest at the time to require the school to meet the toughest standards possible in making the architectural improvements.

After three hearings, the Hearing Examiner issued her report finding that Bogalusa High had provided Pace with a FAPE. The Hearing Examiner explicitly found that the ADAAG guidelines applied, meaning that she concluded that Pace's accessibility concerns regarding improvements made to the campus triggered the application of the 1997 amendment to § 1404 of the IDEA. Otherwise, the ADAAG guidelines would be irrelevant. In making her findings, the Hearing Examiner relied on the voluminous administrative record, which shows that Bogalusa received substantial federal IDEA funds during 1996 and 1997, the relevant time period.[103] IDEA regulations make it clear that federal IDEA funds cannot be co-mingled with state funds.[104] The Hearing examiner also had the benefit of Pace's IEP and the testimony of the School Board's Maintenance Supervisor that the construction changes were made in response to Pace's IEP facilitator's instructions. Even if a showing of the use of IDEA funds was required, it was reasonable for the Hearing Examiner to conclude that IDEA funds were used and that under the amended version of 20 U.S.C. § 1404 the school provided Pace with a FAPE.

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[103] For the 1996-97 fiscal year, the record shows that Bogalusa was the recipient of $164,213 in federal funds for its "Special Education" program.

[104] 34 CFR § 300.152.

Pace appealed the Hearing Examiner's order to the State Level Review Panel (SLRP). Again, the record reflects no argument from any party to that appeal that the entire IDEA statute, including the 1997 amendment to § 1404, did not apply. The SLRP in its opinion explicitly applied the 1997 amendment, discussed Pace's arguments, and after rejecting them, affirmed the Hearing Examiner.

Pace then filed suit in federal district court seeking relief under the IDEA, § 504 and the ADA. He specifically alleged in his petition that the state received federal IDEA funds.[105] His core claim was that the school had failed to comply with the ADAAG.

The primary evidence Pace presented to the district court was the deposition testimony and report of architect Donald MaGinnis, who testified that the structural changes to the campus failed to meet ADAAG standards. Thus, Pace's federal claim was predicated on these guidelines, made applicable to the IDEA by the 1997 amendment to § 1404. Because the Hearing Examiner and the SLRP had rejected Pace's accessibility claims based on application of these same standards (the ADAAG and UFAS), the district court concluded that Pace was precluded from relitigating his accessibility issues.

Suffering summary judgment in the district court on both his IDEA and non-IDEA claims, Pace sought appellate relief from this court. In his initial brief to the panel, Pace argued that the district court erred in accepting the Hearing Examiner and SLRP's findings of accessibility to preclude his non-IDEA accessibility claims. However, Pace

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[105] R. 192.

did not base his argument on the inapplicability of the 1997 amendment to § 1404 or that the Hearing Examiner erred in applying the ADAAG guidelines to the structural changes. The School Board did argue to the panel that the amendment applied and that the Hearing Examiner and SLRP had used the very same federal guidelines in deciding Pace's IDEA claims that Pace sought to litigate in his non-IDEA action.[106]

Faced with the appellee's argument that his non-IDEA claims were precluded due to the previous application of the 1997 amended version of § 1404, Pace filed a reply brief with the panel. Again, he made no effort to refute the School Board's argument that the 1997 amendment to § 1404 applied.

Without any opposition from Pace as to the proper application of § 1404 to the improvements to Bogalusa High's campus, the panel accepted the School Board's unchallenged argument and relied on the 1997 amendment to affirm the district court's judgment.[107] The panel specifically cited the 1997 amended version of § 1404 to support its conclusion that issue preclusion was proper because accessibility to the campus had already been litigated under the same federal standards.[108]

In response to the panel's decision, Pace sought en banc review, where he argued for the first time that § 1404 did not apply to the improvements he demanded in his

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[106] Appellee Bogalusa City School Board's Brief at 32.

[107] *Pace v. Bogalusa City School Bd.*, 325 F.3d 609 (5th Cir.2003).

[108] *Id.* at 614.

IEP, because "[t]here is no proof that construction in this case would be covered by this provision."[109]

In sum, we do not read the 1997 amendment to require proof that IDEA funds were used for improvements to trigger the amendment. Even if the statute can be read in this manner, there is evidence to support an inference that IDEA funds were used to make the structural changes. More importantly, we cannot permit Pace to change his position at will. He was obviously happy to have the administrative bodies and the trial court apply the 1997 amendment to § 1404 (and the strict ADAAG guidelines) when it was helpful to him. He cannot at this late date reverse his position when he finds that application of those guidelines are not in his best interest.

Pace has one remaining argument in support of his position that issue preclusion should not apply to his claims under the ADA and § 504. He argues that the IDEA's "savings clause," gives him the right to maintain a cause of action under the ADA and § 504.[110] We agree that Pace is not limited to a claim under the IDEA and that he can assert claims under the ADA and § 504. But his ability to assert non-IDEA claims does not mean that general principles of issue preclusion do not apply to preclude his

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[109] Appellant Travis Pace's En Banc Brief at 22.

[110] The IDEA's "savings clause" is found in 20 U.S.C 1415(*l*), and provides in pertinent part:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies under . . . the Americans with Disabilities Act of 1990 . . . title V of the Rehabilitation Act of 1973 . . . or other Federal laws protecting the rights of children with disabilities . . .

redundant claims.[111] Because Pace's claims under the ADA and § 504 are factually and legally indistinct from his IDEA claims, issue preclusion is proper in this case.

Because Pace is precluded from litigating the question of whether the defendants have any obligation under the ADA and § 504 to make further architectural or structural changes in the buildings on the Bogalusa campus, his claim for an injunction ordering such changes must also fail.

In conclusion, we AFFIRM the district court's dismissal of Pace's claims under the IDEA and also AFFIRM the district court's dismissal of Pace's claims for damages and injunctive relief under the ADA and § 504.

EDITH H. JONES, Circuit Judge, with whom *E. GRADY JOLLY, JERRY E. SMITH, RHESA HAWKINS BARKSDALE, EMILIO M. GARZA* and *DeMOSS*, Circuit Judges, join, concurring in part and dissenting in part:

I concur in the court's discussion of the merits of Pace's claims, but I respectfully dissent from the majority's conclusion that the State of Louisiana, by accepting federal education funds from 1996 to 1998 (the period here at issue), validly waived its Eleventh Amendment immunity from suit for violations of § 504 and the IDEA statute.

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[111] *See, e.g., Burilovich v. Bd. of Educ.*, 208 F.3d 560 (6th Cir.2000) (issue preclusion may apply to redundant ADA and § 504 claims), *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir.1996) (principles of issue preclusion and claim preclusion may properly be applied to short-circuited redundant claims under other laws) *and Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir.1996) (issue preclusion proper to dismiss § 504 placement claim when identical issue already litigated under the IDEA).

Instead, we should hold that under these limited and unusual circumstances, the State did not knowingly waive its constitutional right to be free from suit by private citizens.[1]

Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.

THE FEDERALIST NO. 81, at 487-88 (Clint Rossiter ed., 1961). The Eleventh Amendment protects States from suit in federal court precisely out of the recognition of their continued status as co-sovereigns. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 689, 121 L.Ed.2d 605 (1993). For over one hundred years, the Supreme Court has "extended a State's [constitutional] protection from suit to suits brought by the State's own citizens." *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 267-68, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997) (referring to *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)).

There are two carefully construed exceptions whereby States may become subject to suits by private citizens. Congress may abrogate state sovereign immunity pursuant

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[1] The panel opinion observed that the State's victory in this case would be Pyrrhic because only during a three-year period could the panel conclude that the State did not "knowingly" waive its Eleventh Amendment immunity. The majority apparently believe that a Pyrrhic victory is one too many.

to § 5 of the Fourteenth Amendment, or the State may waive its sovereign immunity and give its consent to suit. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999). However, "[b]ecause abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, . . . and because States are unable directly to remedy a judicial misapprehension of that abrogation, the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990) (citations and quotations omitted). "Similar solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived that immunity." *Id.*

Travis Pace advances both abrogation and waiver theories in support of his claims against Louisiana. The majority agrees with Pace that Louisiana waived its sovereign immunity as a condition of accepting federal funds under § 504 of the Rehabilitation Act and IDEA. In so doing, the majority has forsaken the "particularly strict standard" the Eleventh Amendment demands, ignored the Supreme Court's settled test for evaluating a waiver of constitutional rights, and inexplicably discounted the unique factual context from which this case arose.

I. WAIVER

As a fundamental constitutional component, "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *Coll. Sav.*

Bank, 527 U.S. at 682, 119 S.Ct. at 2229. The same test used in evaluating waiver of other fundamental constitutional rights must be employed in the Eleventh Amendment context as well. As the Court held, there is no justification for creating a separate and distinct test for Eleventh Amendment waiver purposes. Thus, "[t]he classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a *known* right or privilege." *Id.* (citations and quotations omitted) (emphasis added). According to the sole applicable test, therefore, "waiver must have been made with a full awareness of both the *nature of the right* being abandoned and the *consequences* of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986) (emphasis added). Moreover, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). This circuit, at least until today, adhered to this uniform approach. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences*[.]" *United States v. Newell,* 315 F.3d 510, 519 (5th Cir.2002) (quoting *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)) (emphasis added). A valid waiver requires "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver.*" *Id.* (quoting *Hatfield v. Scott,* 306 F.3d 223, 230 (5th Cir.2002)) (emphasis in original).

The test for a State's waiver of Eleventh Amendment immunity is no different because Congress sought to effect waiver under the Spending Clause. The Supreme Court "has repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Barnes v. Gorman,* 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). "Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] *voluntarily* and *knowingly* accepts the terms of the contract." *Barnes,* 536 U.S. at 186, 122 S.Ct. 2097 (citations and quotations omitted) (emphasis added); *see also Pennhurst,* 465 U.S. at 99, 104 S.Ct. at 907 (the State's consent to suit must be "unequivocally expressed"). As a result, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985).

Despite this clear authority, the majority has crafted a novel waiver test for Spending Clause cases. Relying on *South Dakota v. Dole,* 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the majority draws two conclusions: (1) a State's waiver is knowing so long as Congress satisfies the "clear statement rule," and (2) the State's waiver is voluntary so long as it is "non-coercive." Although I agree with the latter conclusion, the former is incorrect.[2] *College*

[2] *Dole's* "non-coercive" requirement is a satisfactory proxy for the "voluntariness" prong of the waiver inquiry. Thus, under the current

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Savings Bank controls the Eleventh Amendment waiver inquiry and demands more than a congressional "clear statement" – it also requires the State to make a "clear declaration" of its intent to waive its immunity. In *College Savings Bank,* the Supreme Court recognized that for a State "knowingly" to waive its sovereign immunity, not only must Congress make clear its intention to so condition federal funds, but the State must expressly and unequivocally waive its immunity. "There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have that immunity." *Coll. Sav. Bank,* 527 U.S. at 680-81, 119 S.Ct. at 2228. "In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals." *Id.*

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state of the law, § 2000d-7(a) is not unconstitutionally coercive. As a result, the State of Louisiana acted voluntarily for purposes of the constitutional waiver test. But, with due regard for precedent, I am compelled to raise the following question: "If not now, and on this showing, when, and on what showing" will federal grants be deemed unconstitutionally coercive? *Cf. Spangler v. Pasadena City Bd. of Ed.,* 611 F.2d 1239, 1240 (9th Cir.1979). The Rehabilitation Act, pursuant to 29 U.S.C. § 794(a), requires non-consenting States to forfeit *all* federal funds. For the Louisiana Department of Education, renouncing all federal funds would cut its budget by $804,269,621, or 75%. *Dole* counseled that "in some circumstances the financial inducement offered by Congress might be *so coercive as to pass the point at which pressure turns into compulsion.*" 483 U.S. at 211, 107 S.Ct. 2793 (emphasis added). To date, the Supreme Court has not found a case that warranted vindication of this principle. Nevertheless, Louisiana and its children would suffer extreme consequences here if the State were to lose massive federal assistance by asserting its constitutional right to sovereign immunity.

Despite the majority's assertion to the contrary, *College Savings Bank* confirms that *Dole*'s "clear statement" requirement is only half of the waiver equation. *See Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 113-14 (2d Cir.2001) (concluding that "a clear expression of Congress's intent . . . alone is not sufficient . . . to find that [the State] actually waived its sovereign immunity by accepting federal funds"). "The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit." *Coll. Sav. Bank*, 527 U.S. at 680, 119 S.Ct. at 2228 (emphasis in original). "Whether Congress clearly required that a State waive its immunity before accepting federal funds (the first inquiry) is *not* the same thing, however, as whether the State clearly declared its knowing waiver (the second inquiry)." *Douglas v. Cal. Dep't of Youth Auth.*, 285 F.3d 1226, 1228 (O'Scannlain, J., dissenting from denial of petition for rehearing en banc) (emphasis in original). "The mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero*, 473 U.S. at 246-47, 105 S.Ct. 3142.[3]

For a State to evince its "clear declaration" of intent to waive sovereign immunity, it must possess "actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver.*" *Newell*, 315 F.3d at 519 (citations and quotations omitted) (emphasis in original).

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[3] Furthermore, the majority's reliance on the precedents of other circuits is unpersuasive. Those circuits, like our court today, focused exclusively on whether Congress clearly expressed its intention to condition acceptance of federal funds on waiver of immunity – not whether the State reasonably believed it was waiving immunity by accepting federal funds.

In all but the rarest of circumstances, acceptance of federal funds offered in accordance with the "clear statement rule" will meet this test. This case represents an exception to the general rule.

The majority ignores the fact that until the mid-1990's, it was assumed that Congress could abrogate state sovereign immunity in legislation enacted pursuant to its Article I enumerated powers. The Supreme Court held otherwise in *Seminole Tribe v. Florida,* 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), while reaffirming that abrogation remained permissible through a proper exercise of power under § 5 of the Fourteenth Amendment. *Id.* at 59, 116 S.Ct. 1114. In the statutes here at issue – ADA, § 504 and IDEA – abrogation was enacted under the Commerce Clause. Since, however, all three statutes enhance the rights of the disabled, and all three express a clear congressional intent to abridge the States' Eleventh Amendment immunity, federal courts routinely permitted suits by private individuals to proceed against the States. As late as 1998, while applying the Supreme Court's narrow construction of the § 5 abrogation authority,[4] this court still held that the ADA validly abrogated state sovereign immunity. *Coolbaugh v. Louisiana,* 136 F.3d 430 (5th Cir.1998), *cert. denied,* 525 U.S. 819, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998) *overruled by Reickenbacker v. Foster,* 274 F.3d 974 (5th Cir.2001).[5]

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[4] *See City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

[5] *Reickenbacker*'s holding flows from the Supreme Court's decision in *Bd. of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 368, 121 S.Ct. 955, 964, 148 L.Ed.2d 866 (2001), which held that Title I of the ADA did not validly abrogate state sovereign immunity pursuant to

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Surely Louisiana should not be penalized for construing the ADA – and counterpart abrogation language in § 504 and IDEA – just as this court subsequently did in *Coolbaugh*. Instead, the State acted quite rationally in assuming between 1996 and 1998 that it had no sovereign immunity to waive when it accepted federal education funds under conditions specified by § 504 and IDEA. The State voluntarily accepted federal funds, but its acceptance was not a "knowing" waiver of immunity. As the Second Circuit put it, since "the proscriptions of Title II [of the ADA] and § 504 are virtually identical, a State accepting federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, since by all reasonable appearances state sovereign immunity had already been lost." *Garcia*, 280 F.3d at 114 (citations omitted).[6]

The majority offers two principal arguments against this result. First, the majority conflates abrogation and waiver when positing that "Louisiana *did have* Eleventh Amendment immunity to waive by accepting the clearly conditioned federal funds." *See* Majority Op., at 285. (emphasis in original). On the contrary, *Coolbaugh* confirmed, until

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§ 5 of the Fourteenth Amendment. Because Title II of the ADA and § 504 of the Rehabilitation Act offer virtually identical protections, the abrogation analysis with regard to the two statutes is the same. *Reickenbacker*, 274 F.3d at 977 n. 17; *see also Garcia*, 280 F.3d at 114; *Hoekstra v. Indep. Sch. Dist.*, 103 F.3d 624, 626 (8th Cir.1996).

[6] Conversely, after *Garrett* was decided, the State defendants could knowingly waive their immunity because they could have reasonably anticipated the ability to preserve sovereign immunity by declining federal funds under the Rehabilitation Act and the IDEA. *See Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (invalidating an abrogation of Eleventh Amendment immunity pursuant to Title I of ADA).

Garrett and *Reickenbacker* overruled it, that Congress had validly exercised its abrogation authority, rendering Louisiana amenable to suit notwithstanding the Eleventh Amendment. The majority's suggestion that Congress can abrogate sovereign immunity, but still permit the States to retain their Eleventh Amendment immunity, misapprehends the import of abrogation.[7]

Still, Congress may, in its discretion, choose to trigger enforcement of any federal statute, even after it has abrogated sovereign immunity, on the receipt of federal funds. In response, a State, by refusing federal funds, may reject the terms of the "contract" and potentially avoid statutory liability to private individuals. But whether it can avoid liability based upon a contractual/waiver theory is a different question from whether it retained Eleventh Amendment sovereign immunity post-abrogation.[8] Thus, the relevant Eleventh Amendment inquiry remains

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[7] The unmistakable difference between abrogation and waiver is complicated by statutes, like § 2000d-7(a), that attempt to achieve both in the same provision. Nevertheless, the circuit courts and the panel opinion here agree that statutory language may, in fact, constitute both an attempted abrogation and conditional waiver provision. *See, e.g., Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir.2000); *Robinson v. Kansas,* 295 F.3d 1183, 1189-90 (10th Cir.2002). However, a statute's capacity to serve dual purposes does not justify the majority's confusion of the two concepts.

[8] The majority implies that Louisiana's self-interested acceptance of funds should prevent the State from arguing that it might have chosen to forego the funds for the sake of maintaining sovereign immunity. Louisiana's mistaken (though eminently reasonable) belief that abrogation had occurred distorted this calculation, however. That the State *does* have immunity to waive now throws into high relief the potential coercion inherent in the federal government's funding condition. The "cost" of Louisiana's resting on its constitutional right is over $800 million annually!

whether Louisiana reasonably believed, based on objective evidence, that the Rehabilitation Act and the IDEA validly abrogated its sovereign immunity – not whether it could have chosen to reject the federal funds anyway.

Second, the majority contends that requiring the State to make a "clear declaration" problematically "engraft[s] a subjective-intent element onto an otherwise objective Spending Clause waiver inquiry." *See* Majority Op. at 284. Unfortunately, the majority misunderstands the nature of the "clear declaration" requirement, a requirement consonant with the Supreme Court's longstanding objective approach to waiver. The Supreme Court uniformly applies a "totality of the circumstances" test to waiver questions involving fundamental constitutional rights. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). "Only if the totality of the circumstances ... reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the ... rights have been waived." *See Burbine*, 475 U.S. at 421, 106 S.Ct. at 1135. Hence, the Supreme Court considers a variety of *objective* factors, not subjective intent, to determine whether a constitutional right has validly been waived. *Fare*, 442 U.S. at 725, 99 S.Ct. at 2572; *see also United States v. Sonderup*, 639 F.2d 294, 298 (5th Cir.1981) (relying on the objective indicia to determine whether a voluntary, knowing and intelligent waiver was made). *College Savings Bank*'s "clear declaration" requirement reiterates the Supreme Court's waiver test in the Eleventh Amendment context, and so would I.[9]

[9] The majority's approach unquestionably achieves a bright-line rule that the Supreme Court's traditional waiver inquiry cannot.

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Given this court's ruling in *Coolbaugh* that the State had no immunity to waive, followed by an unsuccessful en banc poll and the Supreme Court's denial of *certiorari* in that case, it is inconceivable that Louisiana somehow, based on the "straightforward objective facts," knowingly chose to waive a right that was non-existent when it acted. In a sense, the State of Louisiana is being forced, by today's majority, to bear the burden of this court's mistake of law in *Coolbaugh*. Consider this analogy: the police instruct a criminal defendant, "for his own good," to sign a waiver of counsel form, while telling him that the waiver is "meaningless, because you have no counsel rights to waive." Who would argue that the waiver is knowing, especially if the police showed him a court decision confirming this view? That the dupe is an individual defendant rather than the State does not, per *College Savings,* make this a different case, nor does the fact that the waiver falls under the Spending Clause rather than some other type of enactment. The majority's opinion violates *College Savings Bank.*

In this rare instance, Louisiana could not have knowingly waived its sovereign immunity in the relevant time period before the *Garrett* decision. The majority's approach

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However, this approach is impermissible in the context of waiver of fundamental constitutional rights.

> An express written statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. *The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights* delineated in the *Miranda* case.

North Carolina v. Butler, 441 U.S. 369, 374, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979).

strangely counsels States to disregard governing caselaw when Supreme Court doctrine is evolving. Such an argument makes no more sense in this unusual context than it would in any other.

II. ABROGATION

Pace alternatively argues, and this dissent must determine, whether Congress abrogated Louisiana's sovereign immunity with respect to claims brought under Title II, § 504, and the IDEA. Pace would extend the Court's recent decision in *Tennessee v. Lane,* 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), which held that Title II of the ADA validly abrogates State sovereign immunity insofar as it implicates the physical accessibility of the fundamental constitutional right of access to the courts. The majority here, having found a waiver of the State's immunity, declares it unnecessary to opine on abrogation. The majority goes on, however, to observe that, in *Lane,* the Supreme Court "refused to consider [whether Title II abrogates] other rights, including those considered to be fundamental under the Constitution." *See* Majority Op. at 287, citing 124 S.Ct. at 1993. The majority also comments that the Court "has never before recognized access to public education or freedom from disability discrimination in education as fundamental rights." *Id.,* citing *Plyler v. Doe,* 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 2396-98, 72 L.Ed.2d 786 (1982); *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313 (1985).

I agree with the majority's *dicta* that suggests *Lane* is currently of limited application. Moreover, because *Lane* was written very narrowly, I conclude that this court's

decision in *Reickenbacker* remains valid in holding that ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity. *See Reickenbacker*, 274 F.3d at 983. The fate of § 504 abrogation was also sealed in *Reickenbacker* based on the court's conclusion that Title II and § 504 impose "virtually identical" obligations. *Id.* For the reasons stated in *Reickenbacker* and in the panel opinion, I would hold that Congress could not constitutionally abrogate state sovereign immunity in § 504 or the similarly structured IDEA statute pursuant to § 5 of the Fourteenth Amendment. The remedies imposed by those laws "far exceed [] [those] imposed by the Constitution, and [I] cannot conclude that they are congruent and proportional to the legislative findings of unconstitutional discrimination against the disabled by the states." *Reickenbacker*, 274 F.3d at 983.

III. CONCLUSION

For the foregoing reasons, I conclude that during a narrow period of time, based on uncertainty in the Supreme Court's evolving Eleventh Amendment doctrine, the State of Louisiana did not knowingly waive its Eleventh Amendment sovereign immunity when it accepted federal funds under § 2000d-7(a).

I respectfully dissent.

325 F.3d 609

United States Court of Appeals,
Fifth Circuit.
Travis PACE, Plaintiff-Appellant,
v.
The BOGALUSA CITY SCHOOL BOARD;
Louisiana State Board of Elementary and
Secondary Education; the Louisiana Department
of Education; the State of
Louisiana, Defendants-Appellees.
No. 01-31026.

March 24, 2003.

Anne Arata Spell (argued), Spell & Spell, Franklinton, LA, for Plaintiff-Appellant.

John W. Waters, Jr. (argued), *Ernest L. O'Bannon, Christopher Marx G'Sell*, Bienvenu, Foster, Ryan & O'Bannon, New Orleans, LA, for Bogalusa City School Bd.

Charles K. Reasonover (argued), Lamothe & Hamilton, New Orleans, LA, for Louisiana State Bd. of Elementary & Secondary Education, Louisiana Dept. of Education and State of Louisiana.

Kevin K. Russell (argued), U.S. Dept. of Justice, *Jessica Dunsay Silver*, Tovah R. Calderon, U.S. Dept. of Justice, Civ. Rights Div., Washington, DC, for U.S., Intervenor.

Amy Warr, Austin, TX, for State of Texas, Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before *JONES, SMITH* and *SILER,** Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Travis Pace appeals the district court's dismissal of his claims brought under the Individuals with Disabilities Education Act and the grant of the defendants' motions for summary judgment on his claims brought under Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act. We affirm the district court's judgment for the Bogalusa City School Board. We also hold that the State of Louisiana, the Louisiana Department of Education, and the Louisiana State Board of Elementary and Secondary Education (collectively "State defendants") are entitled to sovereign immunity from Pace's claims under the Eleventh Amendment.

I. BACKGROUND

In 1994, at the age of fifteen, Travis Pace (Pace) was enrolled at Bogalusa High School. He is developmentally delayed, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In July 1997, Pace's mother requested a due process hearing under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., as she believed that Pace was denied a "free appropriate public education" (FAPE) due to a lack of handicap accessible facilities at Bogalusa High School and deficiencies in Pace's "individualized education programs" (IEPs). The hearing officer found that the Bogalusa City Schools System[1] provided Pace with a FAPE in compliance

* Circuit Judge of the 6th Circuit, sitting by designation.

[1] The hearing officer made findings with regard to the Bogalusa City Schools System. In federal court, Pace brought suit against the

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with the IDEA, and the State Level Review Panel (SLRP) affirmed the hearing officer's decision.

In September 1997, Pace filed a complaint with the Office for Civil Rights of the Department of Education (OCR), alleging violations of § 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. The OCR and the BCSB resolved allegations that the BCSB operated services, programs, and activities that were physically inaccessible to or unusable by individuals with disabilities by entering into a voluntary written agreement under which the BCSB would identify accessibility barriers and the OCR would oversee the development of a compliance plan.

In March 1999, Pace filed suit in federal district court, seeking damages and injunctive relief against the BCSB, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of the IDEA, the ADA, § 504 of the Rehabilitation Act, 42 U.S.C. § 1983, and various state statutes.[2] The district court bifurcated Pace's IDEA and non-IDEA claims. In separate orders, it affirmed the SLRP decision by dismissing Pace's IDEA claims, then granted the defendants' motions for summary judgment on Pace's non-IDEA claims. Pace appeals both decisions.

Bogalusa City School Board. For all practical purposes in this case the two entities are the same and will be referred to as "BCSB."

[2] We do not consider Pace's § 1983 claim and state law claims because he has not briefed them on appeal. *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir.1994); F.R.A.P. 28(a)(9)(A).

II. DISCUSSION

A. *State Sovereign Immunity*

Before addressing the merits of Pace's claims, we must determine whether state sovereign immunity bars his claims against the State defendants. The Supreme Court has interpreted the Eleventh Amendment to prohibit suits against a state by its own citizens as well as by citizens of another state or foreign state.[3] *See, e.g., Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 72-73, 120 S.Ct. 631, 640, 145 L.Ed.2d 522, 535 (2000). There are only two exceptions to this longstanding rule. *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999).[4] First, Congress may abrogate state sovereign immunity pursuant to § 5 of the Fourteenth Amendment, which grants Congress the power to enforce the substantive guarantees of the amendment through appropriate legislation. *Id.* Second, a state may waive its sovereign immunity by consenting to suit. *Id.* (citing *Clark v. Barnard,* 108 U.S. 436, 447-48, 2 S.Ct. 878, 883, 27 L.Ed. 780, 784-85 (1883)). At issue in this case is whether Pace's claims under the ADA, § 504 of the Rehabilitation Act, and the IDEA fall within either of these exceptions.

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[3] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

[4] An individual seeking solely prospective relief may also sue a state official in his official capacity under *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In this case, however, Pace has not named any state officials as defendants.

1. Abrogation of state sovereign immunity through § 5 of the Fourteenth Amendment

Pace's ADA claims against the State defendants are foreclosed by this court's recent decision in *Reickenbacker v. Foster,* 274 F.3d 974 (5th Cir.2001). *Reickenbacker* held that Congress did not properly exercise its Fourteenth Amendment § 5 power to abrogate state sovereign immunity against claims brought under Title II of the ADA and § 504 of the Rehabilitation Act. To validly abrogate state sovereign immunity through § 5 of the Fourteenth Amendment, Congress must (1) unequivocally express its intent to abrogate state sovereign immunity, *Kimel,* 528 U.S. at 73, 120 S.Ct. at 640, 145 L.Ed.2d at 535; (2) identify a pattern of unconstitutional action by the states, *Bd. of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 368, 121 S.Ct. 955, 964, 148 L.Ed.2d 866, 880 (2001); and (3) create rights and remedies that are congruent and proportional to the injury, *City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624, 638 (1997). In *Reickenbacker,* this court concluded that although Congress clearly expresses the intent to abrogate state sovereign immunity in both Acts,[5] it failed to identify a history

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[5] 42 U.S.C. § 12202 of the ADA provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(1) provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court

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and pattern of unconstitutional discrimination by the states against the disabled and imposed accommodation obligations on the states that exceed constitutional boundaries. *Reickenbacker,* 274 F.3d at 982-83.

Similarly, the IDEA does not validly abrogate the State defendants' state sovereign immunity. Like the ADA and § 504 of the Rehabilitation Act, the IDEA contains an express statement of intent to abrogate state sovereign immunity,[6] but in enacting the IDEA, Congress did not find that any disparate treatment of students with disabilities resulted from unconstitutional state action.[7] 20 U.S.C. § 1400(c). And even if Congress had identified constitutional transgressions by the states that it sought to remedy through the IDEA, the IDEA requirements, like the ADA and § 504 requirements, exceed constitutional

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for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

[6] 20 U.S.C. § 1403(a) provides:

In general. A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.

[7] Although the primary purpose of the IDEA is to make a FAPE available to all disabled children, 20 U.S.C. § 1400(d)(1)(A), Congress also desired to "ensure equal protection of the law" through the IDEA, *id.* § 1400(c)(6); *Crawford v. Pittman,* 708 F.2d 1028, 1036 (5th Cir.1983) (The IDEA "involves both Congress' power to legislate under the spending clause and to assure equal protection of the laws to all alike under section five of the fourteenth amendment."). Congress's findings regarding the educational needs of children with disabilities and the lack of services within the public school system are set forth in 20 U.S.C. § 1400(c).

boundaries. The IDEA, for example, requires the construction of new facilities and the alteration of existing facilities to comply with the same guidelines and standards used to determine ADA compliance, 20 U.S.C. § 1404(b), and this court has previously held that the ADA's accommodation obligation "far exceeds that imposed by the Constitution," *Reickenbacker,* 274 F.3d at 983. "In many instances, programs rationally related to a legitimate state interest – and thus constitutional under [*City of*] *Cleburne* [v. *Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)] – would be struck down as failing to satisfy the IDEA's requirement that students with disabilities receive a 'free appropriate public education.'" *Bradley v. Ark. Dep't of Educ.*, 189 F.3d 745, 752 (8th Cir.1999), *vacated on other grounds sub nom. by Jim C. v. United States*, 235 F.3d 1079 (8th Cir.2000) (en banc).

2. Waiver of Eleventh Amendment sovereign immunity

Although Congress did not validly exercise its Fourteenth Amendment § 5 power to abrogate states' sovereign immunity under the statutes at issue here, it may have validly conditioned the states' receipt of federal funds upon their waiving sovereign immunity against claims brought under § 504 of the Rehabilitation Act and the IDEA, statutes promulgated pursuant to the spending power.[8]

[8] In *Reickenbacker,* this court specifically reserved the question whether states waive their sovereign immunity under § 504 of the Rehabilitation Act by accepting federal funds. *Reickenbacker,* 274 F.3d at 983. The conditional waiver argument does not apply to the ADA because the ADA is a purely prescriptive statute that does not in any way condition the receipt of federal funds on compliance with the Act or waiver of state sovereign immunity. Title II of the ADA applies to public entities, as defined in 42 U.S.C. § 12131, whether they receive federal

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"Incident to [the spending] power [set forth in Article I, Section 8 of the United States Constitution], Congress may attach conditions on the receipt of federal funds. . . ." *South Dakota v. Dole,* 483 U.S. 203, 206, 107 S.Ct. 2793, 2795-96, 97 L.Ed.2d 171, 178 (1987). In dicta, the Supreme Court has stated that Congress may require states to waive their sovereign immunity as a condition for receiving federal funds. *Coll. Savs. Bank,* 527 U.S. at 686-87, 119 S.Ct. at 2231, 144 L.Ed.2d at 623; *Alden v. Maine,* 527 U.S. 706, 755, 119 S.Ct. 2240, 2267, 144 L.Ed.2d 636, 679 (1999). To do so, Congress must "manifest[ ] a clear intent to condition participation in the programs funded under the [relevant] Act on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 247, 105 S.Ct. 3142, 3149-50, 87 L.Ed.2d 171, 183 (1985).

In 1985, the Supreme Court held that § 504 of the Rehabilitation Act did not contain the unequivocal statutory language necessary to abrogate state sovereign immunity through § 5 of the Fourteenth Amendment and also held that the Act fell far short of manifesting the required clear intent to validly condition a state's receipt

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funds or not. Although 42 U.S.C. § 2000d-7, enacted as part of the Rehabilitation Act Amendments of 1986, states, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance," it does not condition the receipt of federal funds on a state's waiver of sovereign immunity under the ADA; the ADA contains its own abrogation provision in 42 U.S.C. § 12202, and according to a fundamental canon of statutory construction, the provision of a specific act controls over the general provision of another act absent clear legislative intent to the contrary. *Ehm v. Nat'l R.R. Passenger Corp.,* 732 F.2d 1250, 1253 (5th 1984).

of federal funds on waiver of its sovereign immunity. *Id.* In response to *Atascadero,* Congress enacted 42 U.S.C. § 2000d-7, *supra* n. 5. This court has held that in the context of Title IX, 42 U.S.C. § 2000d-7 clearly, unambiguously, and unequivocally conditions a state's receipt of federal educational funds on its waiver of sovereign immunity. *Pederson v. La. State Univ.,* 213 F.3d 858, 876 (5th Cir.2000). Today we extend that portion of the *Pederson* holding to § 504 of the Rehabilitation Act as well.

We reject the state's argument that the Supreme Court's decision in *Garrett* implicitly overruled *Pederson.* Although § 2000d-7 and 42 U.S.C. § 12202 of the ADA contain nearly identical language, *supra* n. 5, the Supreme Court's interpretation of 42 U.S.C. § 12202 in *Garrett* as an invalid abrogation clause does not necessarily mean that § 2000d-7 must also be viewed solely as an abrogation clause and not as a conditional waiver provision. Congress enacted § 504 of the Rehabilitation Act pursuant to its authority under the Spending Clause and clearly conditioned the receipt of federal funds on compliance with the Act's provisions. The ADA, on the other hand, is a purely prescriptive statute that does not in any way condition the receipt of federal funds on compliance with the ADA or waiver of state sovereign immunity. Thus, while § 2000d-7 and 42 U.S.C. § 12202 are identical for purposes of § 5 of the Fourteenth Amendment, § 2000d-7 may also be viewed as a conditional waiver provision enacted pursuant to Congress's spending power. *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir.2001); *Stanley v. Litscher*, 213

F.3d 340, 344 (7th Cir.2000). A number of other circuits have already so held.[9]

That § 2000d-7 authorizes a conditional waiver does not, however, equate with Louisiana's having waived its sovereign immunity by accepting federal funds under the Rehabilitation Act. As the Supreme Court has stated:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an "altogether voluntary" decision to waive its immunity.

Coll. Savs. Bank, 527 U.S. at 680-81, 119 S.Ct. at 2228, 144 L.Ed.2d at 619. An effective waiver of a state's sovereign immunity is the "intentional relinquishment or abandonment of a *known* right or privilege." *Coll. Savs. Bank,* 527 U.S. at 682, 119 S.Ct. at 2229, 144 L.Ed.2d at 620 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938)) (emphasis added). There is no suggestion in *College Savings Bank* that the preconditions for a state's waiver of sovereign immunity

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[9] *See, e.g., Koslow v. Pennsylvania,* 302 F.3d 161, 170 (3d Cir.2002); *Robinson v. Kansas,* 295 F.3d 1183, 1189-90 (10th Cir.2002); *Garcia,* 280 F.3d at 113; *Nihiser v. Ohio Envtl. Prot. Agency,* 269 F.3d 626, 628 (6th Cir.2001), *reh'g denied,* 2001 U.S.App. LEXIS 26424, *cert. denied,* 536 U.S. 922, 122 S.Ct. 2588, 153 L.Ed.2d 777 (2002); *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 820-21 (9th Cir.2001), *reh'g en banc denied,* 285 F.3d 1226 (2002); *Jim C.,* 235 F.3d at 1080.

differ depending on the constitutional provision under which a federal statute was enacted, and indeed, any such distinction makes no sense.

Prior to *Reickenbacker,*[10] the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA.[11] Believing that the acts validly abrogated their sovereign immunity, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds. In *Garcia, supra,* the Second Circuit held that although § 2000d-7 expressed Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity, New York did not waive its sovereign immunity against § 504 claims by accepting federal funds from 1993 to 1995. The court reasoned that at the time New York accepted conditioned funds, Title II of the ADA was reasonably understood to abrogate sovereign

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[10] Although the Supreme Court's decision in *Garrett,* which preceded *Reickenbacker,* may have put states on notice that they retained sovereign immunity against claims brought under Title II of the ADA or § 504 of the Rehabilitation Act, the relevant time period during which the State defendants accepted federal funds in this case – 1996 to 1998 – occurred before *Garrett* was decided. In *Garrett,* the Supreme Court held that Title I of the ADA did not validly abrogate state sovereign immunity pursuant to § 5 of the Fourteenth Amendment because Congress did not identify a history and pattern of unconstitutional employment discrimination by the states against the disabled and because Title I's accommodation duty far exceeds what is constitutionally required.

[11] Because Title II of the ADA and § 504 of the Rehabilitation Act offer virtually identical protections, the abrogation analysis with regard to the two statutes is the same. *Reickenbacker,* 274 F.3d at 977 n. 17; *see also Garcia,* 280 F.3d at 114; *Hoekstra v. Indep. Sch. Dist.,* 103 F.3d 624, 626 (8th Cir.1996).

immunity under Congress's Commerce Clause authority. *Garcia,* 280 F.3d at 114. Likewise, though the Louisiana defendants accepted federal funds after *Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *City of Boerne* – where the Supreme Court explained and then delineated Congress's power to abrogate state sovereign immunity only through § 5 of the Fourteenth Amendment – they cannot be deemed to have anticipated, three to five years before the fact, the Court's decision in *Garrett* and this court's decision in *Reickenbacker,* especially given this court's decision in *Coolbaugh v. Louisiana,* 136 F.3d 430 (5th Cir.1998) (holding that the ADA validly abrogated state sovereign immunity as an exercise of Fourteenth Amendment § 5 powers), *overruled by Reickenbacker,* 274 F.3d 974 (5th Cir.2001). The Louisiana defendants' actions were voluntary, but they did not manifest a *knowing* waiver of that which they could not know they had the power to waive.

Similarly, although 20 U.S.C. § 1403 of the IDEA, *supra* n. 6, constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity,[12] *Bradley,* 189 F.3d at 753;

[12] The title of 20 U.S.C. § 1403, "Abrogation of state sovereign immunity," does not limit the provision to being only an abrogation provision. "[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis.... [T]hey cannot undo or limit that which the text makes plain." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.,* 331 U.S. 519, 528-29, 67 S.Ct. 1387, 1392, 91 L.Ed. 1646, 1652 (1947). Despite the fact that the title of § 1403 uses the term "abrogation," the text and structure of the statute make clear that the voluntary acceptance of federal IDEA funds will result in the loss of state sovereign immunity. *Bradley,* 189 F.3d at 753 ("When it enacted §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and

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Bd. of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir.1999), the State defendants in this case did not knowingly waive their immunity by accepting federal IDEA funds during the 1996-97 and 1997-98 school years. Prior to September 1998, no circuit court had held that § 1403 of the IDEA did not validly abrogate state sovereign immunity, and this circuit did not hold so until today. Under the reasonable belief that the IDEA validly abrogated their sovereign immunity, the State defendants did not know that they retained any sovereign immunity to waive by accepting federal IDEA funds during the relevant time period.

The contrary conclusions of other circuits on the question of waiver under § 504 of the Rehabilitation Act[13] and the IDEA[14] tend to conflate the voluntariness and

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its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA.").

Furthermore, the fact that Congress enacted § 1403 in response to *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989), which held that an earlier version of the IDEA did not evince an unmistakably clear intent to abrogate state sovereign immunity, does not limit § 1403 to being solely an abrogation provision and not a conditional waiver provision. Rather, the legislative history indicates that Congress may have intended a waiver of state sovereign immunity, despite its employment of the term abrogation. *See* H.R.Rep. No. 101-544, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1734. In the original House Report, a section entitled "Waiver of State Sovereign Immunity" indicates that *Dellmuth* misinterpreted Congressional intent and suggests that § 1403 was enacted because it would be "inequitable to deprive beneficiaries under the statute the opportunity to bring suit in federal court while requiring the state to conform to federal standards as a prerequisite for federal funds." *Marie O. v. Edgar*, 131 F.3d 610, 618 n. 15 (7th Cir.1997).

[13] *See, e.g., Koslow*, 302 F.3d at 170; *Robinson*, 295 F.3d at 1189-90; *Nihiser*, 269 F.3d at 628; *Douglas*, 271 F.3d at 820-21; *Jim C.*, 235 F.3d at 1080; *Stanley*, 213 F.3d at 344.

[14] *See, e.g., Bradley*, 189 F.3d at 753; *Kelly E.*, 207 F.3d at 935.

knowingness aspects of waiver. The Second Circuit, however, correctly reasoned that

> [t]hese cases are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank,* 527 U.S. at 682, 119 S.Ct. 2219.

Garcia, 280 F.3d at 115 n. 5; *see also Douglas v. Cal. Dep't of Youth Auth.,* 285 F.3d 1226, 1228 (9th Cir.2002) (O'Scannlain, J., dissenting from denial of reh'g en banc) ("Whether Congress clearly required that a State waive its immunity before accepting federal funds (the first inquiry) is not the same thing, however, as whether the State clearly declared its knowing waiver (the second inquiry)."). We therefore conclude that Pace's claims brought under Title II of the ADA, § 504 of the Rehabilitation Act, and the IDEA are barred against the State defendants in this case by state sovereign immunity.[15]

B. Pace's IDEA claims

The district court decision regarding Pace's IDEA claims is a "mixed question of fact and law that is reviewed *de novo*,

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[15] This decision represents a Pyrrhic victory, to the extent that after *Garrett,* the state defendants *could* knowingly waive their immunity because they could then reasonably have anticipated the ability to preserve sovereign immunity by declining federal funds under the Rehabilitation and IDEA statutes.

but the underlying fact-findings, 'such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error.'" *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir.2000) (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir.1997)). We agree with the district court that Pace's IDEA claims were properly ruled on in the state administrative proceedings and that no procedural flaws infect them.

The IDEA requires states and local educational agencies that receive federal IDEA funds to make a FAPE available to all children with disabilities between the ages of three and twenty-one. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1). The appellees contend that Pace's IDEA claims are moot because he is now 23 years old and no longer attends Bogalusa High School. Although a plaintiff beyond the statutory age of entitlement has no right to seek injunctive relief requiring compliance with the IDEA, *Honig v. Doe,* 484 U.S. 305, 318, 108 S.Ct. 592, 601, 98 L.Ed.2d 686, 703 (1988), he may seek compensation for violations of statutory rights that occurred while he was entitled to them. *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir.1993); *Lester H. v. Gilhool,* 916 F.2d 865, 872 (3d Cir.1990). Because compensatory education is an available remedy for individuals over the age of 21 who were denied a FAPE when they were covered by the IDEA, *Pihl,* 9 F.3d at 185; *Lester H.*, 916 F.2d at 873; *see also Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63 (1st Cir.2002) (compensatory education is an available remedy after graduation), we turn to the merits of Pace's IDEA claims.

The IDEA imposes extensive requirements on participating states and local agencies to safeguard the disabled

child's right to a FAPE. 20 U.S.C. §§ 1414, 1415. The primary safeguard is the IEP, *Honig,* 484 U.S. at 311, 108 S.Ct. at 597, 98 L.Ed.2d at 699, a written statement prepared by a representative of the local school district, the disabled child's teachers and parents, and, whenever appropriate, the child, 20 U.S.C. § 1414(d). The IEP sets forth, inter alia, the child's present educational performance, annual and short-term goals, and educational and related services that will be provided for the child to meet the stated objectives, *id.,* thereby tailoring the FAPE to the particular needs of the child, *Cypress-Fairbanks Indep. Sch. Dist.,* 118 F.3d at 247.

The FAPE described in an IEP "need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." *Id.* at 247-48 (citing *Bd. of Educ. v. Rowley,* 458 U.S. 176, 188-89, 102 S.Ct. 3034, 3042, 73 L.Ed.2d 690, 701 (1982)). To determine whether a FAPE was available to Pace, the court must consider (1) whether the BCSB complied with the procedural requirements of the IDEA and (2) whether Pace's IEPs were reasonably calculated to enable him to receive educational benefits. *Rowley,* 458 U.S. at 206-07, 102 S.Ct. at 3051, 73 L.Ed.2d at 712.

Regarding the first prong of the inquiry, adequate procedural compliance with IDEA requirements will assure, in most cases, that the disabled child's right to a FAPE has been met. *Buser v. Corpus Christi Indep. Sch.,* 51 F.3d 490, 493 (5th Cir.1995). Failure to comply procedurally with the IDEA may alone warrant finding that the defendant failed to provide the plaintiff with a FAPE, *id.,*

but technical deviations will not render an IEP invalid, *Burilovich v. Bd. of Educ.*, 208 F.3d 560, 566 (6th Cir.2000). In this case, the BCSB adequately complied with the procedural requirements of the Act. Pace asserts that his 1996 and 1997 IEPs do not comply with IDEA requirements because they lack a statement of goals and evaluation procedures. This is wrong. Pace's 1996 and 1997 IEPs list numerous goals related to English, language arts, social studies, math, and his development of motor and vocational skills. Although an evaluation method is not listed for every single goal, the IEPs state that Pace's progress will be measured by teacher-made tests, teacher observation, report cards, student handouts, and Pace's work folder.

Pace next contends that the BCSB failed to comply with the procedural requirements of the IDEA because it did not provide him with transition services and did not invite other agencies to his transition plan meetings.[16] The

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[16] Under the IDEA, Pace's IEP must include a statement of transition services that focuses on his course of study and that includes, when appropriate, a statement of interagency responsibilities. 20 U.S.C. § 1414(d)(1)(A)(vii). The IDEA defines transition services as:

> [A] coordinated set of activities for a student with a disability that –
>
> (A) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
>
> (B) is based upon the individual student's needs, taking into account the student's preferences and interests; and
>
> (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

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record contradicts this claim. Pace's 1996 and 1997 IEPs include Individual Transition Plans detailing desired adult outcomes, school action steps, and family action steps for various areas of need such as postsecondary education, employment, living arrangements, homemaking, financial/income, advocacy/legal, community resources, recreation and leisure, transportation, and relationships. Further, Pace's IEP facilitator contacted the Office of Citizens with Developmental Disabilities and the Louisiana Rehabilitation Services Department to assist in providing Pace with transition services. The BCSB also complied with the IDEA's procedural requirements in other respects, allowing Pace's mother to provide meaningful input into decisions affecting his education and to raise objections. The BCSB participated in review of IDEA compliance at a due process hearing.

Regarding the second prong of the *Rowley* inquiry, this court "set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Houston Indep. Sch. Dist.*, 200 F.3d at 347-48 (quoting *Cypress-Fairbanks*, 118 F.3d at 253).

Pace's IEPs easily satisfied these factors and were reasonably calculated to provide him with meaningful

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20 U.S.C. § 1401(30).

educational benefits. First, Pace's IEPs were individualized on the basis of his assessment and performance, reflecting both personal needs and goals. Pace contends that he was denied a FAPE because he was not provided with a computer tailored to assist his special needs, but his 1996 IEP states that he would use a computer to develop certain skills, and a computer was later placed in his classroom. Moreover, the hearing officer found that Pace chose to use a typewriter instead of a computer during the 1996-97 and 1997-98 school years.

Second, Pace was educated in the least restrictive environment.[17] He attended his normally assigned school and was mainstreamed with his peers as much as possible. In 1996, Pace received homebound services only because his wheelchair was broken and he could not attend school while it was being repaired. Testimony at the due process hearing indicates that Pace otherwise had no problems traversing the campus and attending his classes. Scheduled aides as well as an on-call aide were available to help Pace use the bathroom, and teachers helped him use the elevator and open doors. Furthermore, Pace's IEP facilitator testified at the due process hearing that Bogalusa High School constructed two new ramps, modified the elevator, and paved the old handicap parking area; it also added

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[17] 20 U.S.C. § 1412(a)(5)(A) provides:

> In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

handicap signs, a curb extension to the school's front driveway, handicap parking in front of the school, and a handicap accessible water fountain to accommodate Pace.

Third, the key "stakeholders" provided services to Pace in a coordinated and collaborative manner. Pace's regular and special education teachers, social worker, physical therapist, occupational therapist, adaptive physical education teacher, principal, IEP facilitator, and attorney attended his 1997 IEP meeting. Representatives from the Office of Citizens with Developmental Disabilities and the Louisiana Rehabilitation Services Department were contacted and informed of Pace's needs.

Fourth, Pace received both positive academic and non-academic benefits from his educational program. Pace's 1997 reevaluation report states that he was meeting his IEP goals and had improved since the previous year. A comparison of his 1993 and 1996 California Achievement Test scores shows that he raised his grade point level in language expression, language mechanics, vocabulary, mathematics computation, mathematics concepts, and study skills; although he did not raise his grade level in social studies, science, comprehension, and spelling, "it is not necessary for [him] to improve in *every* area to obtain an educational benefit from his IEP." *Houston Indep. Sch. Dist.,* 200 F.3d at 350. Physically and socially he improved in flexibility, mobility, and trunk strength as well as in his ability to form friendships with teachers and peers. Because the BCSB adequately complied with the procedural requirements of the IDEA and reasonably formulated

Pace's IEPs to afford him educational benefits, we agree with the district court that Pace was not denied a FAPE.[18]

C. Pace's non-IDEA claims

The district court granted the defendants' motions for summary judgment on Pace's non-IDEA claims, concluding that they were precluded by the IDEA proceedings. The grant of summary judgment is reviewed de novo and may be affirmed on any ground raised below and supported by the record. *McGruder v. Will,* 204 F.3d 220, 222 (5th Cir.2000). Summary judgment is proper if the record, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hugh Symons Group v. Motorola, Inc.,* 292 F.3d 466, 468 (5th Cir.2002).

Although an IDEA plaintiff can assert claims under other statutes, including the ADA and § 504 of the Rehabilitation Act, 20 U.S.C. § 1415(*l*);[19] *Angela L. v. Pasadena*

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[18] In his appeal brief, Pace also argues that the BCSB denied him a FAPE by failing to provide him with a personal aide. Because Pace did not raise this argument before the district court, he has waived it on appeal. *In re Liljeberg Enters., Inc.,* 304 F.3d 410, 427 n. 29 (5th Cir.2002). Nevertheless, the record shows that scheduled aides as well as an on-call aide were available to assist Pace.

[19] 20 U.S.C. § 1415(*l*) provides:

> Rule of construction. Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections

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Indep. Sch. Dist., 918 F.2d 1188, 1193 n. 3 (5th Cir.1990), we agree with the Sixth, Eighth, and Tenth Circuits that when an administrative decision "is upheld on judicial review under IDEA, principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws." *Indep. Sch. Dist. No. 283 v. S.D.,* 88 F.3d 556, 562 (8th Cir.1996); *see also Burilovich v. Bd. of Educ.,* 208 F.3d 560 (6th Cir.2000) (dismissing ADA, Rehabilitation Act, and state law claims because the plaintiff was offered a FAPE under the IDEA); *Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 728 (10th Cir.1996) (recognizing the similarity between the substantive and procedural frameworks of the IDEA and § 504 and concluding that if a disabled child is not entitled to a neighborhood placement under the IDEA, he is not entitled to such placement under § 504).

Pace and the United States as amicus curiae argue that the district court improperly precluded Pace's non-IDEA claims. Although the United States appears to concede that preclusion is proper when IDEA and non-IDEA claims are factually and legally indistinct from each other, it argues that Pace's IDEA and ADA claims are based on different legal theories because Pace's IDEA claims focus on whether he received meaningful educational benefits from his IEPs while his ADA claims address the accessibility of Bogalusa High School.[20] Pace and the

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(f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

[20] After carefully comparing Pace's ADA and IDEA claims, we conclude that the only ADA claims that were not considered in Pace's IDEA proceedings are not properly in federal court. Pace and the United States argue that Pace's IDEA proceedings should not preclude

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United States seem to ignore the fact that Pace's IDEA proceeding focused heavily on the accessibility of Bogalusa High School. In fact, when Pace's mother initially requested a due process hearing under the IDEA, she primarily expressed concern regarding the lack of handicap accessible facilities at Bogalusa High School and listed among her concerns the bathroom facilities and elevator as well as a lack of aides, ramps, handicap accessible doors, and first floor classes for the disabled. The hearing officer, the SLRP, the district court, and this court have all determined that Pace was not denied a FAPE because of accessibility concerns. We therefore conclude that because

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his ADA claims because the district court did not consider whether the school's designation and installation of certain "accessible" facilities, such as the new ramps and handicap parking spaces, satisfy the standards set forth in the ADA and its implementing regulations for new construction and alteration to existing facilities. Although IDEA plaintiffs can bring claims under other statutes, such as the ADA, they must first exhaust administrative remedies with regard to their claim if they are seeking relief that is also available under the IDEA. 20 U.S.C. § 1415(*l*). In this case, Pace is seeking relief through his ADA claims that is available under the IDEA. The IDEA requires new construction and alteration of existing facilities to comply with the requirements of either the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (appendix A to 28 C.F.R. part 36) or the Uniform Federal Accessibility Standards (appendix A to 41 C.F.R. part 101-19.6), the same guidelines and standards used to determine compliance with Title II of the ADA. 20 U.S.C. § 1404(b); 28 C.F.R. § 35.151(c). Because Pace has not exhausted administrative remedies with regard to these claims, they are not properly before this court. Furthermore, Pace's ADA claim for injunctive relief is moot because he no longer attends Bogalusa High School, *see Filardi v. Loyola Univ.*, No. 97 C 1814, 1998 WL 111683, at * 4, 1998 U.S. Dist. LEXIS 3008, at *11-*12 (N.D.Ill. Mar.12, 1998), and his claim for damages fails because there is no evidence in the record that the defendants intentionally discriminated against him, *Delano-Pyle v. Victoria County*, 302 F.3d 567 (5th Cir.2002). Rather, the BCSB bent over backward to furnish accommodations for Pace.

Pace has been given thorough access to Bogalusa High School for purposes of complying with the IDEA's FAPE requirement, he has not been injured for purposes of asserting technical violations of the ADA regarding the architectural features of the facilities.

Pace also argues that his non-IDEA claims were improperly dismissed because his IDEA proceedings did not determine whether the BCSB discriminated against him in violation of the ADA and § 504 of the Rehabilitation Act. To maintain a cause of action under the ADA or § 504 in this circuit, Pace must show that the BCSB "*refused* to provide reasonable accommodations for [him] to receive the full benefits of the school program." *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir.1983).[21] Because Pace, with the assistance and accommodations provided by the defendants, received meaningful benefits from a FAPE, we cannot conclude that the BCSB *refused* to provide reasonable accommodations to Pace in violation of the ADA and § 504.

Rather, the BCSB provided Pace with reasonable accommodations that comply with both ADA and § 504 standards. ADA and § 504 regulations state that program accessibility compliance regarding existing facilities can be achieved through "the assignment of aides" or "any other methods that result in making its services, programs, or

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[21] Although *Marvin H.* only stated the standard with regard to § 504, this circuit has held that because of similarities between Title II of the ADA and § 504, "[j]urisprudence interpreting either section is applicable to both." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir.2000); *see also Hoekstra v. Indep. Sch. Dist.*, 103 F.3d 624, 626 (8th Cir.1996) (recognizing that the court has "consistently applied § 504 case law to ADA cases").

activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." 28 C.F.R. § 35.150(b)(1); 34 C.F.R. § 104.22(b).

The record shows that scheduled aides as well as an on-call aide were available to help Pace use the bathroom, and teachers helped Pace use the elevator and open doors. With this help, Pace did not have any problems getting around the school and attending his classes. Therefore, even if Pace's ADA and § 504 claims were not precluded by Pace's IDEA proceeding, summary judgment would still be proper because the defendants provided reasonable accommodations for Pace through the provision of aides and assistance that allowed him to receive the full benefits of his school program.

III. CONCLUSION

State sovereign immunity bars Pace's claims against the State defendants. We therefore vacate the district court's grant of the State defendants' motion for summary judgment and remand with instructions to dismiss Pace's claims against the State defendants for lack of jurisdiction. We affirm the district court's dismissal of Pace's IDEA claims against the BCSB as well as the grant of the BCSB's motion for summary judgment on Pace's non-IDEA claims.

AFFIRMED in part, VACATED in part, and REMANDED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TRAVIS PACE	*	**CIVIL ACTION**
VERSUS	*	**NUMBER 99-806**
THE BOGALUSA CITY SCHOOL BOARD, ET AL.	* *	**SECTION "L" (1)**

ORDER AND REASONS

(Filed Aug. 23, 2001)

Before the Court are three motions: 1) defendant Bogalusa City School Board's Motion for Summary Judgment; 2) defendants the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana's Motion to Adopt Bogalusa City School Board's Motion for Summary Judgment; and, 3) defendants the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana's Motion to Dismiss. For the following reasons, defendants the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana's Motion to Adopt Bogalusa City School Board's Motion for Summary Judgment is GRANTED; defendant Bogalusa City School Board's Motion for Summary Judgment is GRANTED; and, the remaining Motion to Dismiss is DENIED as MOOT.

I. BACKGROUND

Travis Pace is a Bogalusa High School student with special needs. Born on April 22, 1979, and a student in the Bogalusa school system since 1982, Travis requires special assistance because he has cerebral palsy, scoliosis, and various learning disabilities. He uses a wheelchair because of his orthopedic impairments and needs assistance to use the bathroom because of a bladder condition. Concerned about a lack of facilities at Bogalusa High School accessible to Travis because of his physical limitations, Travis' mother, Olivia Burks, requested a Due Process Hearing on July 21, 1997 claiming that Travis was being denied a free appropriate public education under the Individuals with Disabilities Education Act ("IDEA"). A hearing was held several times from September to December 1997, and the hearing officer found that Bogalusa had provided Travis with a free appropriate public education in the least restrictive environment.

Travis' attorneys appealed the decision of the hearing officer to the Louisiana State Level Review Panel ("SLRP"). The SLRP reviewed the evidence considered by the hearing officer and found that Travis had received educational benefits and a free appropriate public education from the Bogalusa City school system. *See* SLRP Dec. at 6. Specifically, the SLRP further found that Travis had not been denied a free appropriate public education because of accessibility concerns with other school facilities. *See id.* at 6-7. After reviewing the administrative record from the hearing officer and the SLRP, this Court in its Order and Reasons of March 14, 2001 affirmed the SLRP and found that defendants had not violated Travis' rights under the IDEA.

In his complaint, Travis also alleged violations of the Americans with Disabilities Act ("ADA"), section 504 of the Rehabilitation Act of 1973 ("section 504"), Title 42, United States Code, section 1983 ("section 1983"), Louisiana's Civil Rights for Handicapped Persons act (La. Rev. Stat. 46:2252, 2254) and articles 2315, 2317, and 2320 of the Louisiana Civil Code. These claims are now before the Court on defendants' motion for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). "[A] dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, no genuine issue exists for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 588 (1986). Therefore, "the mere existence of some factual dispute will not defeat a motion for summary judgment; Rule 56 requires that the fact dispute be genuine and material." *Willis,* 61 F.3d at 315.

The burden of demonstrating the existence of a genuine issue is not met by "metaphysical doubt" or "unsubstantiated assertions." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Matsushita,* 475 U.S. at 588). The Court must "resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contrary facts." *Id.* The Court does not, "in the absence of proof, assume that the nonmoving party could or would prove the necessary facts." *Id.* If the evidence leads to only one reasonable conclusion, summary judgment is proper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

III. ANALYSIS

Defendants argue that plaintiff's remaining claims should be dismissed on summary judgment because they have been previously adjudicated through the administrative review process and by this Court. Defendants explain that plaintiff's non-IDEA claims are redundant and subsumed within the decisions concerning the IDEA appeal. Plaintiff responds that his non-IDEA claims are separate and distinct from the IDEA claims and are neither precluded nor merge with the resolution of the IDEA appeal.

It is well settled that a plaintiff suing under the IDEA may also raise viable claims under other statutes as well such as the ADA, section 504, and section 1983. *See* 20 U.S.C. § 1415(1); *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1193, n.3 (5th Cir. 1990). Section 1415(1) of the IDEA, as amended in 1997, states: "Nothing in this title shall be construed to restrict or limit the rights,

procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12010, et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], or other Federal statutes protecting the rights of children with disabilities," except that the plaintiff must exhaust his administrative remedies under IDEA before filing claims under other statutes. 20 U.S.C. § 1415(1); *see Babicz v. School Bd. of Broward County,* 135 F.3d 1420, 1422 (11th Cir. 1998). Because plaintiff's IDEA claims have been adjudicated by state administrative review and by this Court, plaintiff may properly raise claims beyond the IDEA.

Plaintiff, however, cannot maintain a viable claim under a non-IDEA cause of action, such as the ADA, section 504, or section 1983, when the factual basis for such a claim is indistinct from the settled or resolved IDEA claim. *See Moubry v. Independent Sch. Dist.,* 9 F. Supp.2d 1086, 1108-09 (D. Minn. 1998). As the Eighth Circuit explained in *Independent Sch. Dist. v. S.D.,* when the IDEA administrative hearing process produces an administrative decision affirmed on judicial review, "principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws." 88 F.3d 556, 562 (8th Cir. 1996).

The hearing officer, the SLRP, and this Court have all determined that Travis was not denied a free and appropriate public education because of accessibility concerns with Bogalusa High School. *See Pace v. Bogalusa City Sch. Bd.,* 137 F. Supp.2d 711, 719 (E.D. La. 2001). The evidence contained in the administrative record demonstrated that Travis was taught in the least restrictive environment and that he received special accommodations to address his physical needs. *See id.* Specifically, Travis received a

personal key to the school elevator before his classes were transferred from the second to the first floor. *See id.* at 720. An aid assisted Travis whenever he needed to use the bathroom. *See id.* at 19. In addition, the school added ramps to the playfield and handicap spaces to the parking area. *See id.* at 720. Accordingly, the Court affirmed the findings by the hearing officer and the SLRP that defendants did not deny plaintiff his rights under the IDEA because of the facilities at Bogalusa High School.

Plaintiff's non-IDEA claims are precluded because they are part and parcel of the IDEA cause of action. *See Moubry,* 9 F. Supp.2d at 1109 (citing *University of Tennessee v. Elliot,* 478 U.S. 788 (1986)). Plaintiff alleges violations of the ADA, section 504, the United States Constitution pursuant to section 1983, the Louisiana Civil Rights for Handicapped Persons and related state statutes because of alterations to Bogalusa High School that discriminated against him and prevented him from participating in programs and services because of his disability. *See* Pl.'s Detailed Outline (Dec. 28, 1999). He argues that he suffered discrimination because of the school environment and its facilities regardless of whether he received a free and appropriate education under IDEA. Particularly, plaintiff complains that he was discriminated against because he did not receive assistance in using the bathroom and because his special education classes were placed on the second floor of the school. *See id.*

The factual disputes resolved by the Court during the IDEA adjudication provide the basis for plaintiff's additional claims of discrimination. When evaluating the IDEA claim, the hearing officer, the SLRP, and the Court all found that the Bogalusa High School facilities were not improper, deficient, or defective. *See Pace,* 137 F. Supp.2d

at 721. Therefore, plaintiff cannot maintain claims of discrimination based on the same factual allegations as the IDEA cause of action after the Court has already resolved plaintiff's IDEA claim in favor of defendants. *See Hoekstra v. Independent Sch. Dist.,* 103 F.3d 624, 625-627 (8th Cir. 1996) (dismissing ADA, § 504, and § 1983 claims after no viable IDEA claim was found); *Urban v. Jefferson County Sch. Dist.,* 89 F.3d 720, 727-728 (10th Cir. 1996) (granting summary judgment on ADA and § 504 claims because of similarity to substantive and procedural framework of IDEA); *Moubry,* 9 F. Supp.2d at 1108-12 (dismissing ADA, § 504, and state law claims as "duplicative" and "repackaged" IDEA claims); *Robert H. v. NIXA R-2 Sch. Dist.,* 26 IDELR 564 (W.D. Mo. Aug. 9, 1997) (dismissing, ADA, § 504, and § 1983 claims based upon the administrative findings affirmed by the district court under IDEA); *D.F. v. Western Sch. Corp.,* 921 F. Supp. 559, 573-74 (S.D. Ind. 1996) (dismissing ADA and § 504 claims because plaintiffs failed to prove a violation of the IDEA).

Plaintiff responds that his non-IDEA claims were not litigated during the IDEA administrative hearing process and that they are "founded on the discriminatory actions and inactions" of the defendants. Pl.'s Supp. Opp. to Summ. J. at 6. To maintain a cause of action against defendants under the ADA or § 504, plaintiff must show "that a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program." *Marvin H. v. Austin Ind. Sch. Dist.,* 714 F.2d 1348, 1356 (5th Cir. 1983) (emphasis in original); *see Hoekstra,* 103 F.3d at 626 (holding that the ADA, as successor to section 504, imposes an identical standard in education cases); *cf. Birmingham v. Omaha Sch. Dist.,* 220 F.3d 850, 856 (8th Cir.

2000) (requiring proof that "school officials acted in bad faith or with gross misjudgment"). The factual basis for plaintiff's ADA and section 504 claims, however, proves identical to plaintiff's IDEA claim. The Court found that Travis received meaningful educational benefit from a free and appropriate educational program and therefore cannot concomitantly find that the defendants refused to provide reasonable accommodations according to the same facts. *See Moubry,* 9 F. Supp.2d at 1111 (explaining that it would be legally untenable for the court to find a violation of the ADA and § 504 after holding defendants complied with the IDEA requirements).

Plaintiff's claim of civil rights violations similarly fails because they are factually redundant of the IDEA claims. Plaintiff alleges a violation of section 1983 for acts of discrimination by defendants. In order to recover under section 1983, Travis must prove that his constitutional rights were violated as a result of a custom or policy of the defendants. *See Gabriel v. City of Plano,* 202 F.3d 741, 745 (5th Cir. 2000) (citing *Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978)). Plaintiff cites statements by defendants from the IDEA due process hearing of another student as evidence of a policy of discrimination which violated Travis's procedural and substantive civil rights.[1] *See* Pl.'s Supp. Opp. to Summ. J. at 9-12. Specifically, plaintiff indicates that defendants sanctioned a policy of segregating students with disabilities on the

[1] For example, plaintiff quotes the Superintendent of the Bogalusa City School System as stating that schools within the System "are to some degree handicapped accessible, to varying degrees. None of them are state of the art handicapped accessible." Pl.'s Supp. Opp. to Summ. J. at 11.

second floor of Bogalusa High School.[2] *See id.* at 9. In considering the complementary claim under the IDEA, the Court found no statutory violations. Accordingly, no claim for intentional discrimination may rest on the same substantive foundation supporting the IDEA claim. *See Weixel v. Board of Educ. of the City of New York,* 33 IDELR 31 (S.D.N.Y. Aug. 7, 1997) (finding no cognizable section 1983 claim); *Robert H.,* 26 IDELR at 564 (dismissing section 1983 claim based on the same substantive claims raised under the ADA and section 504); *Smith v. Special Sch. Dist. No. 1,* 24 IDELR 1003 (D. Minn. Aug. 7, 1996) (dismissing section 1983 claim based on denial of due process under IDEA).

Plaintiff's state law claims may not proceed because they also arise from the settled facts of the IDEA claim. Plaintiff alleges violations of Louisiana's Civil Rights for Handicapped Persons act (La. Rev. Stat. 46:2252, 2254) and articles 2315, 2317, and 2320 of the Louisiana Civil Code. These statutes, however, provide causes of action for discrimination and tortuous conduct, respectively. Because the Court has already determined that defendants violated none of Travis's rights with respect to claims regarding his education, plaintiff may not continue with his state law claims.

Finally, the Court need not address the merits of the Motions to Dismiss filed by defendants the Louisiana State Board of Elementary and Secondary Education, the

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[2] Plaintiff further quotes the Superintendent as explaining, "When we realized that there were kids who had physical handicaps or visually impaired students or whatever, it would be better to move those classes departmentalized and all to the first floor. We did that." *Id.*

Louisiana Department of Education, and the State of Louisiana because these matters are now moot.

IV. CONCLUSION

For the foregoing reasons, defendants the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana's Motion to Adopt Bogalusa City School Board's Motion for Summary Judgment is GRANTED; defendant Bogalusa City School Board's Motion for Summary Judgment is GRANTED; and, the remaining Motion to Dismiss is DENIED as MOOT.

Done this 23 day of August, 2001
New Orleans, Louisiana

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TRAVIS PACE	*	**CIVIL ACTION**
VERSUS	*	**NUMBER 99-806**
THE BOGALUSA CITY SCHOOL BOARD, ET AL.	* *	**SECTION "L" (1)**

ORDER AND REASONS

(Filed Mar. 14, 2001)

Before the Court is plaintiff's appeal of the Louisiana State Level Review Panel's decision on his Individuals with Disabilities Education Act claims pursuant to 20 U.S.C. § 1401, *et seq.* For the following reasons, the decision of the Review Panel is AFFIRMED, and plaintiff's Individuals with Disabilities Education Act claims are DISMISSED.

I. BACKGROUND

Travis Pace is a Bogalusa High School student with special needs. Born on April 22, 1979, and a student in the Bogalusa school system since 1982, Travis requires special assistance because he has cerebral palsy, scoliosis, and various learning disabilities. He uses a wheelchair because of his orthopedic impairments and needs assistance to use the bathroom because of a bladder condition. Concerned about a lack of facilities at Bogalusa High School accessible to Travis because of his physical limitations, Travis' mother, Olivia Burks, requested a Due Process Hearing on July 21, 1997 claiming that Travis was being denied a free

appropriate public education under the Individuals with Disabilities Education Act ("IDEA").

A hearing convened on August 21, 1997 at the Bogalusa City School Board office. During the hearing, Burks complained that Travis lacked an aide to assist him with his bathroom needs. Travis' attorneys also identified problems with the individualized education programs ("IEPs") designed to address his educational needs.[1] At the request of Travis' attorneys, the hearing officer continued the hearing to allow the parties time to revise and complete Travis' IEP.

The hearing resumed on October 6, 1997 after the parties failed to agree on an IEP for Travis. Earlier that morning, the hearing officer and the parties met at the Bogalusa High School Library to inspect the accessibility problems at the school. The hearing then proceeded at the Bogalusa Public Library but was continued to December 10, 1997 at the request of Travis' attorneys so that they could review documents provided by the Bogalusa City School Board ("Bogalusa"). At the December meeting, Travis' attorneys introduced several documents and then walked out of the hearing despite being notified by the

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[1] An individualized educational program or "IEP" is a written statement which details the present level of a child's educational performance, future goals and objectives for the child, specific services the child is to receive, and a plan for measuring the child's annual progress toward achieving the desired goals. *See* 20 U.S.C. § 1414(d). An IEP is prepared during a meeting between representatives of the school system, the parent or guardian, the child, and other professionals. *See id.* Burks had apparently refused to sign an earlier IEP because she wanted Travis enrolled in a GED program, in a computer class, and assisted by an aide. At the time of the hearing, her main concern was the aide. *See* Tr. Due Process Hr'g, August 21, 1997 at 59.

hearing officer that the hearing would continue notwithstanding their absence. Although left with an incomplete presentation by Travis' attorneys, the hearing officer heard testimony and reviewed exhibits to find that Bogalusa had provided Travis with a free appropriate public education.

Travis' attorneys appealed the decision of the hearing officer to the Louisiana State Level Review Panel ("SLRP"). The SLRP reviewed the evidence considered by the hearing officer and found that Travis has received educational benefits and a free appropriate public education from the Bogalusa City school system. *See* SLRP Dec. at 6. Specifically, the SLRP explained that the parties had resolved Burke's concerns about a bathroom aide although it noted that a full-time aide could be of greatest assistance to Travis. *See id.* The SLRP further found that Travis had not been denied a free appropriate public education because of accessibility concerns with other school facilities. *See id.* at 6-7. The IEP presented by the School Board was also found to be appropriate, but the SLRP noted its concern with the transition plan and encouraged Bogalusa to complete it as soon as possible. *See id.* at 7.

Travis Pace now appeals the decision of the SLRP to this Court. He argues that he has been denied a free appropriate public education under IDEA because he was not provided with transition services, neither the SLRP nor the hearing officer reviewed his entire file, the SLRP did not act impartially, his IEPs and transition plans are deficient, and he has received no educational benefit from the instruction provided by Bogalusa.

II. ANALYSIS

A. IDEA Legal Standard

The IDEA permits aggrieved parties to appeal the findings and decisions of hearing officers and state review panels to a federal district court. *See* 20 U.S.C. § 1415(i)(2)(A). When considering an appeal under IDEA, the district court reviews the records of administrative proceedings, hears any additional evidence requested by the parties, and bases its decision on the preponderance of the evidence to determine whether to grant relief it deems appropriate. *See id.* § 1415(i)(2)(B). The Court affords "due weight" to the findings of the hearing officer, "but must ultimately reach an independent decision based on a preponderance of the evidence." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000) (quoting *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998)). The standard of review, therefore, is "virtually de novo." *Id.*

Plaintiff argues that Travis did not receive a free appropriate public education as guaranteed by IDEA. *See* 20 U.S.C. § 1401(8). "[A] free appropriate public education consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982). The free appropriate public education is tailored to the particular needs of the child by the creation of an individualized education program or IEP. *See id.* at 181. Prepared during a meeting between representatives of the school system, the parent or guardian, the child, and other professionals, the IEP is a written statement which details

the present level of the child's educational performance, future goals and objectives for the child, specific services the child is to receive, and a plan for measuring the child's annual progress toward achieving the desired goals. *See id.* at 182; 20 U.S.C. § 1414(d).

To determine whether Travis has received a free appropriate public education, the Court must answer two questions. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *See Rowley,* 458 U.S. at 206-207. If these two questions can be answered affirmatively, then the state has fulfilled its obligations under the law. *See id.* The "free appropriate public education . . . need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." *Cypress-Fairbanks,* 118 F.3d at 247 (citing *Rowley,* 458 U.S. at 188-89). Thus, the IDEA only requires states to provide a "basic floor of opportunity consistent with equal protection." *Rowley,* 458 U.S. at 200.

The Court in determining whether a child has received a free appropriate public education "must be careful to avoid imposing [its] view of preferable educational methods upon the States." *Id.* at 207. The IDEA creates a presumption in favor of the local school district's educational plan for the child. *See Teague Indep. Sch. Dist. v. Todd L.,* 999 F.2d 127, 132 (5th Cir. 1993). Parties challenging the plan bear "the burden of showing why the educational setting established by the IEP is not appropriate."

Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1291 (5th Cir. 1991) (quoting *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd*, 468 U.S. 833 (1984)). Travis Pace, therefore, must show why his educational plan is inappropriate.

B. Procedural Violations

The IDEA requires states and school districts to follow detailed procedural requirements in order "to guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate." *Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (quoting *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

These procedures include an opportunity for the parents of a child with a disability (1) to examine the child's records and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, (2) to obtain an independent educational evaluation of the child, (3) to receive written notice prior to changes in the identification, evaluation or educational placement of the child, and (4) to present complaints concerning the identification, evaluation, or educational placement of the child at a mediation, and if necessary, an impartial due process hearing. *See* 20 U.S.C. § 1415(b), (e), (f); *Buser*, 51 F.3d at 493.

In this case, plaintiff alleges that defendants violated the procedural requirements of IDEA because (1) Travis has not received transition services; (2) the hearing office and state review panel failed to review Travis' entire file; (3) the state review panel did not act impartially; and (4)

Travis' evaluations and educational plans contain several deficiencies. *See* Pl.'s Appeal Br. at 3.

1. Transition Services

Plaintiff first asserts that defendants neither offered nor provided Travis with transition services.[2] Under IDEA, Travis' IEP must provide a statement of the transition services he needs that focuses on an appropriate course of study and includes a statement of any interagency responsibilities. *See* 20 U.S.C. § 1414(d)(1)(A)(vii). Plaintiff argues that defendants violated the procedural requirements concerning transition services by not inviting other agencies to his transition plan meetings and by not providing any transition services to Travis. *See* Pl.'s Appeal Br. at 4-5.

Neither the due process hearing officer nor the SLRP found due process violations related to transition services. The hearing officer did not identify transition services as a specific cause for concern by plaintiff, and the issue of

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[2] "Transition services" are defined by IDEA as:

> [A] coordinated set of activities for a student with a disability that – (A) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (included supported employment), continuing and adult education, adult services, independent living, or community participation; (B) is based upon the individual student's needs, taking into account the student's preferences and interests; and (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

20 U.S.C. § 1401(30).

transition services was not formally raised until the state review hearing. While the SLRP indicated its concern about the transition plan for Travis and recommended that Bogalusa "finish its Transition Plan for Travis as soon as possible," it did not find sufficient evidence to characterize the IEP and services presented by Bogalusa for Travis as procedurally deficient. SLRP Dec. at 7.

The administrative and evidentiary record supports the finding by the hearing officer and SLRP that defendants satisfied their procedural requirements concerning transition services under IDEA. First, defendants included a discussion of transition services in Travis' reports and evaluations. Defendants prepared Individual Transition Plans ("ITPs") in association with Travis' IEPs of August 29, 1996 and of May 19, 1997 detailing desired adult outcomes, school action steps, and family action steps. *See* Pl.'s Appeal Br. Ex. 1. Defendants explain that subsequent IEPs have also included transition services. *See* Bogalusa's Appeal Br. at 11. Bogalusa's Reevaluation Report of August 28, 1997 also identified transition services as a need and recommendation for Travis. *See* Pl.'s Appeal Br. Ex. 3, 4. Both parties, therefore, recognized the importance of transition services for Travis.

Second, defendants contacted appropriate state and local agencies to assist in providing Travis with transition services. In a letter dated September 30, 1997, Travis' IEP facilitator communicated to his attorney that she had contacted the Office of Citizens with Developmental Disabilities and that they had requested that Travis' parent or guardian contact them directly to determine his eligibility for services. *See* Bogalusa's Appeal Br. Ex. D. A representative from the Louisiana Rehabilitation Services Department also explained to Travis' IEP facilitator that

scheduling conflicts had prevented a rehabilitation counselor from attending Travis' IEP meetings. *See id.* Ex. E. Finally, plaintiff's expert concludes that Travis is receiving appropriate transition services according to his December 10, 1998 IEP. *See* Pl.'s Appeal Br. Ex. 11. Therefore, the Court finds that defendants satisfied their procedural responsibilities concerning transition services.

2. Review of Record

Plaintiff next argues that Travis was denied a free appropriate public education because the SLRP failed to review the entire administrative record. Specifically, plaintiff claims that neither the hearing officer nor the SLRP reviewed IEPs from May 19, 1997 and October 3, 1996 before reaching their conclusions. Plaintiff explains that the hearing officer lacked copies of the IEPs and that the SLRP failed to cite them in its decision. The administrative record, however, indicates otherwise. Defendants provided the hearing officer with copies of Travis' IEPs from May 19, 1997 and October 3, 1996, and the hearing officer heard testimony from Travis' IEP facilitator and teacher regarding the IEPs. *See* Hr'g Officer's Findings & Decision ¶18. The SLRP also found that the May 19, 1997 IEP was formulated to enable Travis to receive educational benefits. *See* SLRP Dec. at 7. Thus, the evidence from the administrative record demonstrates that both the hearing officer and the SLRP reviewed documents in the record and received testimony concerning their contents. Plaintiffs complaints concerning the review of Travis' file fail to rise to the level of procedural violations under IDEA.

3. Impartiality

Plaintiff contends that the SLRP was not impartial in reviewing the decision of the hearing officer because members of the panel had reviewed another case involving the same defendants and counsel. Plaintiff, however, offers no evidence to support his contention of impartiality. Without specific evidence to the contrary, the Court finds no reason to question the impartiality of the SLRP.

4. Deficiencies in IEPs

Plaintiff asserts that the evaluations, IEPs, and ITPs prepared for Travis contained various deficiencies resulting in procedural violations that denied him a free appropriate public education. While defendants must adhere to the procedural requirements of IDEA, "adequate compliance with the procedures will, in most cases, assure the disabled child's substantive right to free appropriate public education has been met." *Buser,* 51 F.3d at 493 (citing *Rowley,* 458 U.S. at 206). In this case, the hearing officer found a lack of evidence to support a conclusion that Travis was denied a free appropriate public education because of deficiencies in IEPs or other procedural violations. Moreover, the SLRP indicated that plaintiff presented insufficient evidence to demonstrate alleged deficiencies in Travis' IEPs. Plaintiff now cites several procedural violations concerning IEPs in its expert report, but these violations occurred prior to the due process hearing and were not beyond the scope of review of the hearing officer and the SLRP. *See* Pl.'s Appeal Br. Ex. 11. The Court finds that the weight of the credible evidence supports the rulings of the hearing officer and the SLRP

regarding any procedural deficiencies in the IEPs. [*]mandated by IDEA because Travis' mother, Olivia Burks, was provided an opportunity for meaningful participation into the decisions affecting Travis and was able to exercise her right to review and challenge the decisions concerning his educational program that she felt were inappropriate.[3] *See Buser,* 51 F.3d at 493.

C. Meaningful Educational Benefit

Plaintiff alleges that Travis has received no educational benefit from the instruction provided by Bogalusa. The Fifth Circuit has established four factors to determine whether an IEP is reasonably calculated to provide a meaningful educational benefit to a child with special needs. *See Bobby R.,* 200 F.3d at 347-48. These factors question whether:

> (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) positive academic and non-academic benefits are demonstrated.

Id. (quoting *Cypress-Fairbanks,* 118 F.3d at 253).

The Court first finds that Travis' program is individualized on the basis of his assessment and performance. The August 29, 1996 IEP signed by Burks details Travis'

[* Introductory sentence inadvertently omitted from the record.]

[3] The Court also notes that the hearing officer conducted the hearing requested by Burks even though counsel for Travis chose no longer to participate. *See* Hr'g Officer's Findings & Decision ¶ 8.

specific needs and how they are being met. *See* Hr'g Officer's Findings & Decision, Sch. Bd. Ex. 4. The IEP explains that Travis requires assistance going to the bathroom and is aided by a certified nursing assistant twice daily and also has a male aide para-educator in the classroom who is available for emergencies and additional bathroom assistance. *See id.* Travis has a key to the elevator to attend upstairs classes although all his classes are now on the first floor. *See id.* He also sits at a special desk to accommodate his wheel chair and has a faculty member assigned to help him evacuate during fire drills. *See id;* ¶ 18. Additionally, Travis has received both physical and occupational therapies even though they were not written in to his IEP. *See* Hr'g Officer's Findings & Decision ¶ 18.

The IEP also accounts for Travis' particular academic and vocational needs. Consistent with the neuropsychological evaluation of Children's Hospital submitted by plaintiff, Travis receives special academic assistance from Bogalusa to accommodate his reading, writing, and arithmetic needs. *See* Pl.'s Appeal Br. Ex. 6. The IEP states that Travis is enrolled in a self-contained class because of his need for extra time to complete his work, one-on-one teaching, and comprehension of material. *See* Hr'g Officer's Findings & Decision, Sch. Bd. Ex. 4. With respect to his vocational needs, Travis in enrolled in a GED program and computer training at his mother's request. Travis' IEP facilitator also testified at his hearing that Travis works with a special lap top keyboard and received a computer from Medicaid funds. *See* Hr'g Officer's Findings & Decision ¶ 18. Travis' educational program, therefore, identifies and addresses his particular special needs.

The Court next finds that the program was administered in the least restrictive environment.[4] The least restrictive environment means educating Travis as much as possible with children who have no special needs. *See* 20 U.S.C. § 1412(5)(A); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 691 (5th Cir. 1996). Travis' educational setting should be based on the needs identified in his IEP, in the school he would otherwise attend if he had no special needs, and according to the special services he requires without respect to removing him from the general student body because of needed modifications in the general curriculum. *See* 34 C.F.R. § 300.552(3).

Travis is taught in the least restrictive environment because he attends his normally assigned school and is mainstreamed as much as possible with his peers.[5] He attends several classes with other children at Bogalusa High School. He has been enrolled in a generic class for students with mild or moderate special needs and receives

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[4] The "least restrictive environment" is defined by IDEA as requiring:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(A).

[5] In October of 1996, Travis received homebound services because of problems with his wheelchair. *See* Hr'g Officer's Findings & Decision, Sch. Bd. Ex. 5. The IEP providing these services, however, limited his homestay to the time when his chair was repaired. *See id.*

special education services in a self-contained classroom setting. *See* Bogalusa's Reevaluation Report of August 28, 1997. Travis also has attended GED classes with other students. *See* Hr'g Officer's Findings & Decision ¶ 18.

With respect to his physical needs, Travis' IEP indicates that he receives assistance using the bathroom and during emergencies and also has a personal key to access the elevator. *See id.* Ex. 4. Travis' teachers testified at the due process hearing that he moves throughout Bogalusa High School and never complains about entering and exiting through the doors at the school. *See id.* ¶ 19. Travis' adaptive physical education teacher explained that Travis is capable of getting on and off the field on his own, but that the teacher offers Travis assistance to save time. *See id.* ¶ 20. Moreover, Travis' occupational therapist explained that Travis can use the elevator, eat with other children in the cafeteria, but required some assistance in the bathroom. *See id.* ¶ 25. Travis' physical therapist similarly stated that he worked with Travis on using his wheel chair and was not aware of any particular difficulties Travis had moving throughout the school. *See id.* ¶ 24.

In addition to the physical assistance designated for Travis in his IEP, additional accommodations were made to Bogalusa High School following plaintiff's request for a due process hearing. Travis' IEP facilitator testified that all his classes were moved to the first floor, two ramps were constructed onto the field, a curb extension was added to the front driveway, new handicap parking spaces were added to the front of the school and the old handicap parking area was paved, new handicap signs were installed, modifications were made to the elevator, and a new water fountain with handicap access was installed. *See id.* ¶ 18. The Court finds, therefore, that Travis has

received his education in the least restrictive environment appropriate with his special educational and physical needs.

The Court also finds that the key "stakeholders" provided services in a coordinated and collaborative manner. Although plaintiff only argues that defendants failed to contact stakeholders related to transition services, the evidence indicates that defendants involved the key stakeholders in developing Travis' educational program. Travis' September 26, 1997 IEP meeting was attended by Travis' regular education and special education teachers, school social worker, physical therapist, occupational therapist, adaptive physical education teacher, principal, IEP facilitator, and attorneys. *See* Bogalusa's Appeal Br. Ex. C. While unable to attend the IEP meeting, representatives from the Office of Citizens with Developmental Disabilities and the Louisiana Rehabilitation Services Department were contacted by the IEP facilitator and made aware of Travis' needs. *See* Bogalusa's Appeal Br. Ex. D, E. Thus, Travis was not denied meaningful educational benefit because defendants involved the key stakeholders in his educational program.

Finally, the Court finds that Travis demonstrated positive academic and non-academic benefits from his educational program. Travis' reevaluation report of August 28, 1997 explains that he has made progress in achieving his IEP goals and has improved since his last evaluation. *See* Bogalusa's Reevaluation Report of August 28, 1997; *cf.* Pl.'s Appeal Br. at 10 (noting that Travis failed to meet his goals according to his evaluation of June 6, 1994). Travis has raised his grade point levels in Language Expression, Language Mechanics, Vocabulary, Mathematics Computation, Mathematics Concepts, and Study Skills from April

1993 to April 1996. *See* Bogalusa's Reevaluation Report of August 28, 1997. His teachers note that he is meeting his academic goals although he still has difficulty in writing and history. *See id.* His occupational and physical therapists identify strengths in Travis' mobility as well as continued areas for further development. *See* Occupational & Physical Therapy Evaluation of August 25, 1997. While Travis' school social worker explains that Travis fails to meet his goals when he lacks motivation and misses school, his Occupational and Physical Therapy Progress Report from the third quarter of the 1996-1997 school year states that "Travis has had a good quarter" and appears more motivated and involved. *See* Pl.'s Appeal Br. Ex. 5. Based on the submitted evidence and testimony, the Court finds that Travis has demonstrated positive academic and non academic benefits from his educational program.

In summary, the Court finds that Travis has received meaningful educational benefit from the educational program provided by defendants. Travis' program is individualized on the basis of his assessment and performance and is administered in the least restrictive environment. Key "stakeholders" provided services in a coordinated and collaborative manner, and Travis has demonstrated positive academic and non-academic benefits from his educational program.

IV. CONCLUSION

For the foregoing reasons, the decision of the Louisiana State Level Review Panel on plaintiff's Individuals with Disabilities Education Act claims is AFFIRMED, and plaintiff's Individuals with Disabilities Education Act claims are DISMISSED.

Done this 13 day of March, 2001
New Orleans, Louisiana

/s/ Eldon E. Fallon
UNITED STATES DISTRICT
JUDGE

(2)

No. 04-1655

SUPREME COURT, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

In the Supreme Court of the United States

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL., PETITIONERS

v.

TRAVIS PACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and for violations of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

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In the Supreme Court of the United States

No. 04-1655

LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL., PETITIONERS

v.

TRAVIS PACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-62) is reported at 403 F.3d at 272. The opinion of the panel of the court of appeals (Pet. 63-87) is reported at 325 F.3d 609. The opinions of the district court (Pet. App. 88-97 and 98-114) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 8, 2005. The petition for a writ of certiorari was filed on June 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damages actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794].
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, created a federal grant program that provides billions of dollars to States to educate children with disabilities. In order to qualify for IDEA funding, a State must have "in effect policies and procedures to ensure" that a "free appropriate public education is available to all children with disabilities." 20 U.S.C. 1412(a) and (a)(1)(A). The statute also requires States accepting IDEA funds to provide an administrative process for resolving IDEA disputes and authorizes civil suits in federal court by any party aggrieved by the outcome of an IDEA administrative hearing. See 20 U.S.C. 1415(f) and (f)(i). In 1990, Congress enacted a provision, now codified at 20 U.S.C 1403(a), which provides in pertinent part that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of" the IDEA.

3. In 1990, Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, to supplement the requirements of Section 504 and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II of the ADA, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities. Title II largely tracks Section 504, but applies to every "public entity," regardless of whether it receives federal funding. See 42 U.S.C. 12131-12132. One provision of the ADA abrogates state sovereign immunity to suits for violations of the ADA. 42 U.S.C. 12202.

4. In 1994, at the age of 15, plaintiff Travis Pace enrolled at Bogalusa High School in Louisiana. He is

developmentally delayed, confined to a wheelchair, and suffers from cerebral palsy and bladder incontinence. In March 1997, Pace's mother, believing that her son was being denied a free appropriate public education, requested a due process hearing under the IDEA to address the lack of accessible facilities at the high school and deficiencies in Travis's individualized education plan. The hearing officer found in favor of the school board, and the Louisiana review panel affirmed that decision. Pet. App. 3-4.

5. In 1999, Pace filed suit in federal court against the Bogalusa City School Board, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the State of Louisiana, alleging violations of Section 504, the IDEA, and Title II of the ADA. The complaint sought damages and injunctive relief. The district court severed Pace's IDEA claims and entered an order affirming the administrative finding that the defendants had not violated the IDEA. Pet. App. 89, 98-114. The district court later granted summary judgment to defendants on Pace's claims under Section 504 and the ADA, concluding that those claims were barred by principles of issue preclusion because the factual basis for those claims was the same as the factual basis for Pace's IDEA claims. *Id.* at 93-94.

6. Pace appealed, and the United States filed an amicus brief in the court of appeals addressing the claims on the merits. On October 10, 2002, the panel hearing the case *sua sponte* ordered the parties to address whether the Eleventh Amendment barred Pace's claims against the State defendants. The United States then intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statutory provisions conditioning the

receipt of federal financial assistance on a knowing and voluntary waiver of sovereign immunity.

On March 24, 2003, the panel issued its opinion concluding that the Eleventh Amendment precluded Pace's claims against the state defendants. Pet. App. 63-87. Applying the Circuit's prior decision in *Pederson* v. *Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the panel concluded that Section 2000d-7 "clearly, unambiguously, and unequivocally conditions a state's receipt of federal * * * funds on its waiver of sovereign immunity." Pet. App. 71. The panel also concluded that, under the IDEA, Section 1403 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of sovereign immunity." Pet. App. 74. Nonetheless, the panel found that the State did not knowingly waive its sovereign immunity by applying for and accepting federal funds. Expanding upon the reasoning of *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the panel concluded that because at the time of the events underlying this case "the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under * * * Title II of the ADA * * *, the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds." Pet. App. 73. The panel applied the same reasoning to both Section 504 and the IDEA, concluding that, until the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a state agency could reasonably have believed that Title II of the ADA validly abrogated its immunity and, therefore, could not knowingly have waived its immunity to claims under either Section 504 or the IDEA. Pet. App. 73-76.

7. a. The court of appeals granted the petitions of the United States and Pace for rehearing en banc and vacated the panel's opinion. 339 F.3d 348 (2003). On March 8, 2005, the en banc court issued its decision holding that the state agency defendants knowingly and voluntarily waived their Eleventh Amendment immunity to claims under Section 504 and the IDEA when it accepted IDEA funds, and that Section 504 and the IDEA are valid exercises of Congress's authority under the Spending Clause. Pet. App. 1-31.

Relying on this Court's decision in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the court held that "congressional spending programs that are enacted in pursuit of the general welfare and unambiguously condition a state's acceptance of federal funds on reasonably related requirements are constitutional *unless* they are either (1) independently prohibited or (2) coercive." Pet. App. 11. The court noted that the State had not disputed that the Spending Clause statutes at issue in this case were "enacted in pursuit of the general welfare" and were "sufficiently related to the federal interest in the program funded." *Id.* at 15. The court proceeded to consider the other requirements for a valid exercise of congressional power under the Spending Clause.

The court held that the conditions on federal spending in Sections 2000d-7 and 1403 are "unambiguous." Pet. App. 18. The court explained that "during the relevant time period, §§ 2000d-7 and 1403 put each state on notice that, by accepting federal money, it was waiving its Eleventh Amendment immunity." Pet. App. 22. The court rejected petitioners' attempt to "engraft[] a subjective intent element onto the otherwise objective Spending Clause waiver inquiry," holding that the fact that a State "might not 'know' subjectively whether it

had any immunity [left] to waive by agreeing to th[e] [statutory] conditions is wholly irrelevant." *Id.* at 22-23. The court concluded that, in light of the unambiguous statutory condition, the State's "waiver of Eleventh Amendment immunity to actions under § 504 and the IDEA was knowing." *Id.* at 24.

The court also held that Sections 2000d-7 and 1403 do not violate any independent constitutional prohibition. The court concluded that those provisions do not violate the "unconstitutional-conditions" doctrine, because States as sovereigns, unlike private parties, have the resources to protect their interests and because in any event the need to protect a State from "coercion or compulsion * * * is subsumed in the non-coercion prong of the *Dole* test." Pet. App. 27. The court also concluded that the conditions in Sections 2000d-7 and 1403 are not unduly coercive. The court noted that, to avoid suit under Section 504 or the IDEA, a "state would not have to refuse all federal assistance." *Id.* at 28. Instead, "[a] state can prevent suits against a particular agency under § 504 by declining federal funds for that agency," and "[a] state can avoid suit under the IDEA merely by refusing IDEA funds." *Ibid.* The court accordingly "refuse[d] to invalidate Louisiana's waiver on coercion grounds." *Ibid.*

Although the court of appeals found that the state defendants were not immune from Pace's IDEA and Section 504 claims, the court agreed with the panel and the district court in affirming the administrative determination that defendants did not violate Pace's rights under the IDEA. Pet. App. 32-34. The en banc court further agreed with the panel and the district court in holding that issue preclusion prevented Pace from pursuing his ADA and Section 504 claims because those

claims "are factually and legally indistinct from his IDEA claims." *Id.* at 49. Thus, the court ultimately affirmed the district court's dismissal of Pace's IDEA, ADA, and Section 504 claims against petitioners.

b. Judge Jones, joined by five other judges, concurred in part and dissented in part. Pet. App. 49-62. She agreed with the majority that the Spending Clause statutes at issue in this case are "not unconstitutionally coercive." *Id.* at 53-54 n.2. But in her view, a State may not be found to have waived its right to sovereign immunity unless it "possess[ed] actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver*." *Id.* at 55 (internal quotation marks and citation omitted). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the ADA had purported to abrogate its immunity to claims under that statute. *Id.* at 57. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504 and IDEA either. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court nor cite any conflict of continuing significance with any other court of appeals. Moreover, petitioners ultimately prevailed in the decision below. Further review is not warranted.

1. As an initial matter, further review is not warranted in this case because petitioners prevailed below. Although the court's decision in petitioners' favor was based on the merits rather than on petitioners' theory of state sovereign immunity (which the court rejected), the court of appeals ultimately affirmed "the district court's dismissal of Pace's claims under the IDEA and * * * Pace's claims for damages and injunctive relief under the ADA and § 504." Pet. App. 49. A ruling from this Court in favor of petitioners on the Eleventh Amendment immunity question would thus have no practical effect on this case or on the judgment ultimately reached. In analogous circumstances, this Court has declined to review decisions at the behest of parties who have obtained a final judgment in their favor in the lower court. See *Mathias* v. *WorldCom Techns., Inc.*, 535 U.S. 682 (2002). The circumstances of this case are not sufficient to overcome the long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); *J.E. Riley Inv. Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827); *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821).

2. In any event, this Court has frequently denied petitions for certiorari raising arguments indistinguishable from those advanced by petitioners, and there is no reason for a different result in this case. In a number of recent cases, this Court has denied petitions for certiorari challenging the constitutionality of Section 504 of the Rehabilitation Act and of 42 U.S.C. 2000d-7. See *WMATA* v. *Barbour*, 125 S. Ct. 1591 (2005) (No. 04-748); *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314);

Pennsylvania Dep't of Corr. v. *Koslow*, 537 U.. 1232 (2003) (No. 02-801); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). Petitioners do not argue that 20 U.S.C. 1403, which was not at issue in those cases, presents any distinct issue. Accordingly, just as in those cases, further review is not warranted, and the petition should be denied.

Petitioners do not dispute that the language of the relevant statutes makes clear that a state agency may accept federal funds only if the State waives the agency's sovereign immunity against claims under Section 504 and the IDEA.[1] Nor do petitioners contend that

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[1] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Nieves-Marquez* v. *Commonwealth of Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Even the Second Circuit, which has concluded that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States in the future.

the condition Congress has placed on the receipt of federal funds is not "related" to the funds, as required under *South Dakota* v. *Dole*, 483 U.S. 203 (1987). See Pet. App. 15. Rather, petitioners contend that their waiver was invalid because (a) conditioning receipt of federal funds on a waiver of state sovereign immunity violates the "unconstitutional conditions doctrine," (b) the condition imposed is unconstitutionally coercive, and (c) the state was without notice—and the waiver therefore ineffective—because petitioner believed that Congress had already abrogated its immunity to claims under the Americans with Disabilities Act. None of those contentions are correct, and none of them warrant further review.

a. *Unconstitutional conditions.* This Court has repeatedly recognized Congress's authority to condition a State's receipt of federal financial assistance on acceptance of federal conditions, including a waiver of Eleventh Amendment immunity. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court explained that "a waiver [of immunity] may be found in a State's acceptance of a federal grant." *Id.* at 678-679 n.2. This Court further made clear that its recent sovereign immunity cases have done nothing to undermine well-settled authority under which Congress may condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See *id.* at 686-687; see

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now that those concerns have dissipated. See *Garcia* v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2001). The dissenting judges in this case similarly concluded that, beginning in 2001, States that accepted federal funds waived their immunity to claims under Section 504 and IDEA. See Pet. App. 57 n.6; see also *id.* at 62 (State did not waive its immunity "during a narrow period of time").

also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985).

Petitioners argue (Pet. 8) that "this Court has never ruled on" whether Congress may condition the receipt of federal funds on a State's waiver of its sovereign immunity, leaving lower courts to rely on what petitioners argue (Pet. 14) is "*obiter dicta* in *Alden* * * * and *College Savings Bank* * * * in concluding that Congress can condition federal financial assistance upon a waiver of sovereign immunity." The courts of appeals, however, have uniformly concluded that Congress does indeed have the power to attach such a condition to federal spending programs. No court of appeals—indeed, none of the appellate judges (including the dissenting judges in this case) who have questioned the applicability of Section 504 to the States on other grounds—has suggested that either Section 504 or the IDEA is invalid as applied to the States because they conflict with this Court's unconstitutional conditions cases. See Pet. 11 n.25 (citing appellate cases upholding Section 504 and dissenting opinions).[2]

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[2] Petitioner contends that, under the unconstitutional conditions doctrine, "a person may not be compelled to choose between the exercise of a [constitutional] right and participation in an otherwise available public program." Pet. 15 (quoting *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)). But sovereign immunity is an immunity, not a right, and the doctrines specifically addressing the waiver of such immunity, rather than the unconstitutional conditions doctrine, clearly govern here. See also note 3, *infra*. In any event, the unconstitutional conditions doctrine does not provide that Congress may *never* condition a benefit on the waiver of a constitutional right. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v.

Even aside from *Alden* and *College Savings Bank*, this Court has expressly addressed the validity of conditioning federal funds on a waiver of sovereign immunity.[3] In *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), for example, this Court held that Congress could condition its grant of a gratuity under one of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *Petty* involved two States that desired to enter a compact to create a bi-state agency to build bridges and operate a ferry service. Under the Constitution, Congress must consent to such compacts. See U.S. Const. Art. I, § 10. Congress agreed to authorize the compact, but only if the States agreed to accept a provision that would authorize federal courts to have jurisdiction over claims against the bi-state agency. The States agreed. The Court explained that the "question here is whether Tennessee and Missouri have waived their immunity under the facts of this case," and held that they had because

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James, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's consent to inspection of home without probable cause). Instead, the doctrine provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship to the [right].*" *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (emphasis added). Petitioners do not challenge the satisfaction of that "relatedness" requirement in this case.

[3] The "unconstitutional conditions" doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). The relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144 (1992).

"[t]he States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." 359 U.S. at 277, 281-282. *Petty* could not have come out the same way if, as petitioner contends, Congress can never require a State to waive the immunity of one of its agencies in exchange for a federal benefit.

Moreover, the Court assumed in *Dole* that the Twenty-First Amendment vested the States with sole authority to set the drinking age. 483 U.S. at 209. But the Court explained that the vesting of that authority in the States did not prevent Congress from attempting to influence the States' exercise of their authority through an offer or withdrawal of federal funds:

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. at 210-211 (quoting *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985).

b. *Coercion.* In the alternative, petitioners argue (Pet. 18-25) that the conditions Congress placed upon the receipt of federal education funds by enacting Section 504 and the IDEA are unconstitutionally coercive. Although petitioners claim that the courts of appeals have adopted varying approaches to determining whether federal Spending Clause statutes are unconstitutionally coercive, the differences are largely ones of verbal formulation rather than real substance. Petitioners do not cite a single case in which a court of appeals has applied the coercion test to invalidate *any* federal statute, let alone one of the statutes at issue in this case.

This Court noted in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). In *Steward Machine* itself, however, the Court expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Moreover, the Court in *Dole* also recognized that every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court explained, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole*, the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions at-

tached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioners argue (Pet. 22) that the State would have to elect not to seek federal funds for its entire Department of Education if it wishes that agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity. This Court, however, has upheld Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, against similar attacks in *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974), and *Grove City College* v. *Bell*, 465 U.S. 555, 575-576 (1984). The same rationale applies here. Moreover, this Court has upheld the validity of the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Act in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court rejected the school district's argument that the Act as interpreted unduly hindered local control, explaining that

> because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, * * * [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

Id. at 241 (citation omitted).

Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it elects to remain federally funded. See *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978); see also *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars.") (citation omitted), cert. denied, 531 U.S. 1035 (2000). In addition, the State's ability to define and allocate the functions of its state agencies, and thereby to limit the scope of the waiver when it accepts federal funds under Section 504 or the IDEA, minimizes the threat of coercion. See Pet. App. 28.

c. *Subjective knowledge.* Petitioners argue (Pet. 25-29) that the State's waiver of immunity to suits under Section 504 was not knowing—and therefore ineffective—because petitioners believed that Congress had already abrogated the State's immunity to claims under a different law—Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* Petitioners rely on the Second Circuit's decision in *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2001), which held that a state agency's acceptance of clearly-conditioned funds "alone is not sufficient" to waive immunity. *Id.* at

113-114. Under *Garcia*, the question is whether the state agency "believed" the waiver would have any practical impact. *Id.* at 115 n.5. The court in *Garcia* reasoned that, because the "proscriptions of Title II [of the ADA] and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [under Section 504], * * * since by all reasonable appearances state sovereign immunity had already been lost [to claims under Title II]." *Id.* at 114 (citation omitted). Further review is not warranted to consider petitioner's *Garcia*-based argument.

(*i*) The court of appeals correctly rejected petitioner's claim. As in other contexts, what must be known for a valid waiver of sovereign immunity to claims under Section 504 is the existence of the legal right to be waived and the direct legal consequence of the waiver, not the practical implications or costs of waiving the right.[1] Since the enactment of Section 2000d-7 in 1986, the plain text of that provision has in-

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[1] See *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."); *Moran* v. *Burbine*, 475 U.S. 412, 421-423 (1986); see also *Patterson* v. *Illinois*, 487 U.S. 285, 294 (1988) (waiver not rendered unknowing simply because a party "lacked a full and complete appreciation of all of the consequences flowing from his waiver") (internal quotation marks omitted); *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. * * * [A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

formed every state agency that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Even under the theory embraced in *Garcia*, Section 504 validly abrogated the States' immunity from 1986 to 1992 (the ADA's effective date). Neither Section 504 nor Section 2000d-7 was amended or altered by the enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute or both statutes. See 42 U.S.C. 12201(b) (preserving existing causes of action); 42 U.S.C. 12202 (ADA provision purporting to abrogate a State's sovereign immunity only to "an action in Federal or State court of competent jurisdiction for a violation of *this chapter*") (emphasis added). A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity it might have to suit under Section 504, regardless of whether it believed that its immunity had also been abrogated by a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

(*ii*) More generally, the Second Circuit in *Garcia* erred in concluding that a State's acceptance of clearly conditioned federal funds may be insufficient to support a finding that the State has waived its immunity. Under this Court's precedents, the existence of a waiver turns on the State's objective manifestation of assent by accepting clearly-conditioned funds. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (holding that "acceptance of the funds entails an agreement" to funding conditions); *id.* at 678-679 n.2 ("[A] waiver may be found in a State's acceptance of a federal grant."); cf. Restatement

(Second) of Contracts §§ 2, 18 (1981) (contractual obligations attach by virtue of manifestation of assent). The State's subjective beliefs about the consequences of its acceptance of funds are not relevant.

Indeed, after the Second Circuit decided *Garcia*, this Court expressly rejected the contention that the validity of a waiver of sovereign immunity turns on an analysis of a State's subjective intentions and beliefs. In *Lapides* v. *Board of Regents of University System*, 535 U.S. 613 (2002), the State of Georgia did not believe that it was actually relinquishing its right to sovereign immunity when it removed the case to federal court because, under Georgia law, the Attorney General of the State lacked authority to waive the State's sovereign immunity. And under *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the State asserted, it could reasonably believe that, absent that state law authority, no action by the Attorney General in litigation would constitute a valid waiver of the State's sovereign immunity. See *Lapides*, 535 U.S. at 621-622.[3] Nonetheless, this Court held that the removal of the case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity. *Id.* at 624. The Court specifically rejected the State's request to examine the State's subjective beliefs and motives in determining whether the State's actions amounted to an unequivocal waiver, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621.

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[3] In fact, this portion of the holding in *Ford Motor Co.* was good law until this Court overruled it in *Lapides* itself. See *Lapides*, 535 U.S. at 622-623.

The Second Circuit's requirement that courts engage in the difficult evaluation of a State's subjective beliefs and motives before concluding that the State has waived sovereign immunity is inconsistent with *College Savings Bank* and with this Court's subsequent teaching in *Lapides*. Petitioner's acceptance of clearly conditioned federal funds constituted a waiver, regardless of petitioner's subjective beliefs or its assessment of the value of the immunity it was waiving in light of an abrogation provision in a statute imposing similar substantive obligations.

(*iii*) The Fifth Circuit's decision to follow other courts of appeals in rejecting the *Garcia* rationale does not present a direct or continuing conflict warranting this Court's review.

First, the Second Circuit's decision in *Garcia* predated this Court's decision in *Lapides*. *Lapides* casts such substantial doubt on *Garcia* that review of the *Garcia* rationale in this case, before the Second Circuit has had the opportunity to reconsider its position in light of *Lapides*, would not be warranted. Likewise, the Second Circuit has not had an opportunity to reconsider *Garcia* in light of this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which, contrary to the holding of *Garcia*, concluded that Title II validly abrogated the States' Eleventh Amendment immunity in at least some of its applications.[6]

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[6] Since *Garcia* was decided, no other court of appeals to consider the reasoning of *Garcia* has adopted it as law of the circuit. See, *e.g.*, *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Garrett* v. *University of Ala. Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003); *Doe* v. *Nebraska*, 345 F.3d 593, 601-602 (8th Cir. 2003); *M.A.* v. *State-Operated Sch. Dist.*, 344 F.3d 335, 349-351 (3d Cir. 2003).

Second, there is in any event no direct or continuing conflict between the Second Circuit's decision in *Garcia* and the decision of the court of appeals in this case, because the *Garcia* rule, to the extent it survives *Lapides* and *Lane* at all, is just a transitional rule that has likely already lost any continuing significance. *Garcia* held that the waiver for Section 504 claims was effective before Title II of the ADA went into effect in 1992, but then lost its effectiveness when Title II took effect. The court recognized, however, that the waiver may well have regained its full effectiveness once again at some point in the late 1990's, when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. See *Garcia*, 280 F.3d at 114 n.4 (waiver of immunity to Section 504 claims may become effective again when State had a "colorable basis for the state to suspect" that it had retained its immunity to suit, "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity").

Under the *Garcia* rationale, the point at which Section 504 waivers of state sovereign immunity would regain their validity likely occurred by 1997. By that time, this Court had decided *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). After *Seminole Tribe*, and even more so in response to *City of Boerne*, States around the country began challenging the validity of Title II's abrogation, and some courts accepted those arguments. See, *e.g.*, *Brown* v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and

rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002). By March 1998, 33 States—including Louisiana—filed an amicus brief in this Court arguing that City of Boerne made it "doubtful" that Congress could have validly abrogated States' Eleventh Amendment immunity to suits under Title II of ADA. State of Nevada et al. Amicus Brief at 10, *Pennsylvania v. Yeskey*, 524 U.S. 206 (1998) (No. 97-634). Accordingly, it appears that the Second Circuit, like the other courts that have addressed the issue, would conclude that a State's waiver of immunity to Section 504 suits is valid for most or all cases currently being litigated and for all cases that will arise in the future. The dispute between the Second Circuit's view and that of the other courts of appeals affects at most any pending Section 504 cases against States seeking monetary damages that arose between the effective date of Title II of the ADA in 1992 and (at the latest) 1997.

(*iv*) Petitioners err in arguing that the court of appeals' determination that the State's waiver of its immunity was knowing and voluntary conflicts with this Court's recent decision in *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005). The Court held in *Jackson* that recipients of federal funds should have understood that the term "sex discrimination" in Title IX of the Education Amendments of 1992 encompassed retaliation against those who complain of violations. In reaching that conclusion, the Court reiterated the principle that recipients of conditioned federal funds may be subject to suits for damages for conduct in violation of a Spending Clause statute only if the recipients "had adequate notice that they could be liable for the conduct at issue." *Id.* at 1509. The court of appeals faithfully applied that principle in the instant case when

it held that, because the federal funds accepted by petitioners were clearly conditioned upon a waiver of petitioner's immunity, petitioners were on adequate notice that they would not be immune to claims under Section 504 if they accepted federal funds. Thus, the decision of the court of appeals is entirely consistent with the analysis and result in *Jackson*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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